(14)

No. 95-1181-CFX Title: William C. Dunn and Delta Consultants, Inc., Petitioners
v.
Commodity Futures Trading Commission, et al.

Docketed:
January 23, 1996 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Dec 11 1995	Application (A95-501) to extend the time to file a petition for a writ of certiorari from December 24, 1995 to January 23, 1996, submitted to Justice Ginsburg.
	Dec 12 1995	Application (A95-501) granted by Justice Ginsburg extending the time to file until January 23, 1996.
	Jan 23 1996	Petition for writ of certiorari filed. (Response due April 24, 1996)
	Feb 16 1996	Order extending time to file response to petition until March 25, 1996.
	Mar 20 1996	Order further extending time to file response to petition until April 24, 1996.
	Apr 24 1996	Brief of respondents Commodity Futures Trading Commission in opposition and for the United States as amicus curiae filed.
	Apr 24 1996	Brief amici curiae of Foreign Exchange Committee, et al. filed.
	Apr 25 1996	Brief amici curiae of Credit Lyonnais, et al. filed.
	May 3 1996	Reply brief of petitioners William C. Dunn, et al. filed.
	May 8 1996	DISTRIBUTED. May 24, 1996
	May 28 1996	Petition GRANTED. SET FOR ARGUMENT November 13, 1996. **********
	Jul 12 1996	Brief amici curiae of Foreign Exchange Committee, et al. filed.
	Jul 12 1996	Joint appendix filed.
	Jul 12 1996	Brief of petitioners William C. Dunn & Delta Consultants, Inc. filed.
	Jul 12 1996	Brief amici curiae of Credit Lyonnais, et al. filed.
	Aug 6 1996	Order extending time to file brief of respondent on the merits until August 30, 1996.
	Aug 29 1996	Brief amicus curiae of Board of Trade of The City of Chicago filed.
	Aug 30 1996	Brief amicus curiae of Chicago Mercantile Exchange filed.
	Aug 30 1996	Brief of respondent Commodity Futures Trading Commission filed.
	Sep 13 1996	CIRCULATED.
	Sep 16 1996	Motion of Foreign Exchange Committee, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Sep 19 1996	Record filed.
	Sep 20 1996	Record filed.
	Oct 3 1996	Reply brief of petitioners William C. Dunn & Delta Consultants, Inc. filed.
	Oct 15 1996	Motion of Foreign Exchange Committee, et al. for leave to participate in oral argument as amici curiae and for

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No. 95-1181-CFX

Entry	Date	Proceedings and Orders
		divided argument DENIED.
	Nov 7 1996	LODGING consisting of 20 copies of the October 29, 1996 decision of the 9th Cir. Court of Appeals decision in CFTC v. Frankwell Bullion Ltd., et al., Docket No. 95-16977 submitted by counsel for the petitioners.
	Nov 13 1996	ARGUED.

(1)

No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

—v.—

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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68 pp

QUESTION PRESENTED

Whether the "Treasury Amendment" (7 U.S.C. § 2(ii)) to the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) — which provides in pertinent part that "Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade" — exempts from the jurisdiction of the Commodity Futures Trading Commission off-exchange foreign currency options.

PARTIES TO THE PROCEEDING

Petitioners are William C. Dunn ("Dunn") and Delta Consultants, Inc. ("Consultants"). Dunn is an individual; Consultants is a New Jersey corporation of which Dunn is the president.

Respondents are the Commodity Futures Trading Commission, Delta Options, Ltd. (an investment company incorporated in the Bahamas, which presently is in liquidation), and Nopkine Co., Ltd. (an investment company incorporated in the British Virgin Islands, which has not appeared in this action).

Pursuant to Rules 14.1(b) and 29.6 of the Rules of this Court, petitioner Consultants states that it has no parent companies or subsidiaries.

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MISCELLANEOUS

No. ____

In the

Supreme Court of the United States

October Term, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

v.

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Dunn and Consultants petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. A, is reported at 58 F.3d 50. The order and memorandum of the district court, App. B, are unreported.[1]

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[1] Pursuant to Rule 14.1(h) of the Rules of this Court, federal jurisdiction in the district court was allegedly based on the question of the application of a federal statute. 28 U.S.C § 1331.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A timely petition for rehearing and a suggestion for rehearing in banc was denied on August 4, 1995. App. C. On December 12, 1995, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including January 23, 1996. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (the "CEA"), which is codified at 7 U.S.C. § 2(ii), provides in full as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

STATEMENT

The Treasury Amendment to the CEA exempts from the jurisdiction of the Commodity Futures Trading Commission (the "CFTC") all "transactions in foreign currency," unless they occur on an organized "board of trade" (or "exchange"). 7 U.S.C. § 2(ii). Here, it is undisputed that Petitioners' trading in foreign currency options did not occur on any organized "exchange."

In the district court, the CFTC brought an enforcement action against Petitioners (and the other defendants), and obtained the appointment of a temporary equity receiver. The

district court rejected Petitioners' contention that their off-exchange transactions in foreign currency options were excluded from CFTC jurisdiction by the Treasury Amendment. The court of appeals affirmed.

The 1974 Amendments to the Commodity Exchange Act and the Treasury Amendment

The CEA establishes a comprehensive system for regulating commodity futures contracts[2] and options.[3] It broadly defines a "commodity" (7 U.S.C. § 1(a)(3)), and also provides for broad CFTC authority (*id.* § 2(i)). However, the Treasury Amendment — the immediately following subsection, 7 U.S.C. § 2(ii) — provides an express exemption from CFTC jurisdiction for off-exchange "transactions in foreign currency" (such as those engaged in by Petitioners). This provision — which was inserted into the CEA in 1974 when the CFTC was established as an independent authority — was enacted in response to the specific concerns of the Treasury Department that the exercise of broad jurisdiction by the CFTC over off-exchange foreign currency transactions would adversely impact that market.

The Treasury Department expressed its concern in a letter to the Senate Committee on Agriculture and Forestry, requesting clarification that the CFTC would not have jurisdiction over "futures trading in foreign currencies off organized exchanges." S. REP. No. 1131, 93d Cong., 2d Sess. 49 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5887.

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[2] A futures contract is an agreement to make or take delivery of a specific amount of a commodity at an agreed-upon price, on a specified future date, which can be traded on a public exchange. JOHN DOWNES & JORDAN ELLIOT GOODMAN, DICTIONARY OF FINANCE & INVESTMENT TERMS 168 (Barron's Financial Guides, 3d ed. 1993).

[3] An option is an agreement that gives the purchaser the right, but not the obligation, to purchase (a "call" option) or to sell (a "put" option) a specified amount of a commodity, at an agreed-upon price, on or before a specified future date. *Id.* at 297-98.

The letter states in pertinent part as follows:

> The Department believes the bills contain an ambiguity that should be clarified. The provisions of the bills do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of futures trading on organized exchanges, and would not extend to futures trading in foreign currencies off organized exchanges. . . .
>
> The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency. Virtually all futures trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements.

Id. at 5887-88.

The Treasury Department also expressed the specific concern that CFTC regulation "would confuse an already highly regulated business sector," and "could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." *Id.* at 5888. Accordingly, the letter concluded by "strongly urg[ing] the Committee to amend the proposed legislation" to clarify that it would not apply to "futures trading in foreign currencies or other financial transactions of the nature described above other than on organized exchanges." *Id.* at 5889.

The language which the Treasury Department then proposed was enacted verbatim as the Treasury Amendment (with

a minor excision not relevant in this case). As the Fourth Circuit noted in *Salomon Forex, Inc. v. Tauber,* 8 F.3d 966, 976 (4th Cir. 1993), *cert. denied,* 114 S. Ct. 1540, *reh'g denied*, 114 S. Ct. 2156 (1994), "[t]his Treasury request and direct congressional response is revealing" in its indication of congressional intent to accept the Treasury Department's suggestion that all foreign currency transactions conducted off organized exchanges should be excluded from CEA coverage.

The District Court's Decision

The CFTC alleged that Petitioners (as well as the other defendants) violated the CEA in connection with various investments in off-exchange foreign currency options. On the same day it filed its complaint, the CFTC applied for, and was granted, an *ex parte* order freezing Petitioners' assets.

Subsequently, the CFTC sought the appointment of a temporary equity receiver. In opposition to that request, Petitioners argued that the Treasury Amendment exempted from CFTC jurisdiction off-exchange transactions in foreign currency options such as theirs, and thus the district court was without subject matter jurisdiction. The district court rejected Petitioners' contention, and appointed a temporary equity receiver. App. B.

The Second Circuit's Decision

Although the Second Circuit affirmed, the panel did not consider whether the Treasury Amendment exempts off-exchange foreign currency options from CFTC jurisdiction. Instead, the panel held that it was "foreclosed by clear precedent in this circuit that holds that the term 'transaction in foreign currency' does not include options, even those options traded off-exchange" (App. A, 6a) — citing a decision by a prior panel in *Commodity Futures Trading Commission v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986). However, *American Board of Trade*

involved exchange trading of options.[4] Although the court stated that the Treasury Amendment did not "appear to exclude defendants' foreign currency options business from regulation" (*id.* at 1248, emphasis added), it held that options were not "transactions in foreign currency" until they were exercised and currency actually was exchanged — and thus were not exempted by the Treasury Amendment. *Id.* at 1248-49.

The panel below acknowledged Petitioners' and *amici*'s contention that the prior panel's reasoning was dicta because:

> *American Board of Trade* involved transactions that were non-exempt because they had occurred on an exchange. Therefore, it was not necessary [for the prior panel] to hold that all options were outside the Treasury Amendment exemption to reach the conclusion that the transactions at issue in *American Board of Trade* fell within the CFTC's jurisdiction.

App. A, 6a. Although the panel acknowledged that the reasoning of *American Board of Trade* may have been "broader than necessary," it held that it had no authority to reconsider the *ratio decidendi* of a prior panel:

> The fact that a quite different line of reasoning leading to the same result might have been adopted by a prior panel does not give a later panel in this circuit free rein to disregard an earlier decision. . . . Whatever doubts this panel may have about the interpretation given the Treasury Amendment in *American Board of Trade*, therefore, are not grounds for our declining to follow it.

Id.

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[4] Indeed, the defendant was specifically described by the court as "an organization that provided, *inter alia*, an exchange and market place for certain commodity options transactions." 803 F.2d at 1244.

The panel below recognized that, by applying *American Board of Trade* to off-exchange foreign currency options, it created a conflict among the circuit courts, and candidly invited appeal to a higher authority:

> We acknowledge that our interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* conflicts with that of the Fourth Circuit in *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, __U.S.__, 114 S. Ct. 1540, 128 L. Ed. 2d (1994). This conflict is for the Supreme Court, not us, to resolve.

Id.

Although the panel below may not have had the authority to limit the breadth of the prior panel's decision in *American Board of Trade*, the court of appeals certainly had that authority in banc. Although Petitioners filed a timely petition for rehearing and suggested rehearing in banc, it was denied. App. C.

REASONS FOR GRANTING THE PETITION

In 1974, at the same time that it expanded the definition of "commodity" and created the CFTC, Congress enacted the "Treasury Amendment" to preserve the historic exemption for off-exchange transactions in foreign currency. The Treasury Amendment is so named because it was proposed by the Treasury Department in an effort to limit the CFTC's regulation of "trading on organized exchanges," and exempt "trading in foreign currencies off organized exchanges," in order to avoid the adverse impact on "the usefulness and efficiency of foreign exchange markets." S. REP. No. 1131, 93d Cong., 2d Sess. 49 (1974), reprinted in 1974 U.S.C.C.A.N. 5843, 5887-88.

The decision of the court below gives the CFTC jurisdiction over options in the multi-trillion dollar off-exchange for-

eign currency market, and squarely conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in *Salomon Forex*. Because of that conflict, parties to foreign currency option contracts are now subject to flatly inconsistent regulations — subject to CFTC jurisdiction in the Second Circuit, and exempt from CFTC jurisdiction in the Fourth Circuit. The consequences of the conflict are not hypothetical. Option contracts governed by New York law are not adjudicated only in the Second Circuit. Indeed, the contracts at issue in *Salomon Forex* were apparently governed by New York law. *See Salomon Forex*, 8 F.3d at 970, 978.

The legal uncertainty created by the lower court's decision jeopardizes the efficiency and future innovation of capital markets, and threatens to increase the cost of government borrowing. As the Department of Justice represented on behalf of the United States and the Securities and Exchange Commission in *Salomon Forex*:

> [F]ailure to qualify for exemption from the CEA under the Treasury Amendment could preclude the existence of certain off-exchange markets which perform vital financial functions, even where they are subject to oversight by other financial regulatory agencies, such as the Department of the Treasury and the SEC.

Brief for the United States as *Amicus Curiae* in *Salomon Forex, Inc. v. Tauber*, No. 92-1406 (4th Cir.), App. D, 7d.

A. *The Judgment of the Court of Appeals Below Conflicts Directly with the Judgment of the United States Court of Appeals for the Fourth Circuit*

The decision below squarely conflicts with a decision of the Fourth Circuit in *Salomon Forex*. There, the Fourth Circuit held that individually negotiated sales of foreign currency futures and options — *i.e.*, off-exchange options — were exempted from CFTC jurisdiction by the Treasury Amendment.

In *Salomon Forex*, a foreign currency trader claimed that his off-exchange transactions in foreign currency forwards and options were voidable as unlawful — since the CEA allegedly required foreign currency futures to be traded exclusively on exchanges designated by the CFTC, and options to be traded on CFTC or SEC designated exchanges. *Salomon Forex*, 8 F.3d at 973. The Fourth Circuit rejected the trader's claim, and found the contracts lawful. Relying on the plain language of the Treasury Amendment, the Fourth Circuit concluded that "transactions in foreign currency" in fact "reach beyond transactions in the commodity itself and . . . include all transactions in which foreign currency is the subject matter, including futures and options," and thus off-exchange "transactions in foreign currency, including futures and options, are exempted from regulation by the CEA." *Id.* at 975-76.

This Court denied a petition for a writ of certiorari filed by the trader in *Salomon Forex*. At that time, there was no direct conflict among the circuits. The Second Circuit, in *American Board of Trade*, had held the Treasury Amendment exemption inapplicable to trading on an organized exchange. The trader in *Salomon Forex*, by contrast, had traded off-exchange. The distinction between on-exchange and off-exchange trading was critical to the Fourth Circuit in *Salomon Forex* (and perhaps to this Court as well), since the Treasury Amendment does not exempt exchange transactions. 7 U.S.C. § 2(ii). As the Fourth Circuit explained:

> Tauber finally relies heavily on decisions of the Second and Seventh Circuits [*Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982)] in defending his position, arguing that affirmance of the district court would result in a split among the circuits. The decisions to which Tauber cites do not conflict with the outcome we reach today, however, as both cases concerned on-exchange trading on behalf of the

> general public, not individual, large-scale deals between professionals.

Salomon Forex, 8 F.3d at 977.[5]

In light of the decision below, the on-exchange/off-exchange distinction by which the Fourth Circuit reconciled its judgment with those of its sister circuits can no longer be maintained. The Second Circuit panel below, on the authority of *American Board of Trade*, has held that the CFTC has jurisdiction over off-exchange foreign currency options and that the Treasury Amendment exemption is inapplicable. By clinging to the prior precedent in *American Board of Trade*, the decision below incorrectly interpreted the "transactions in" language of the Treasury Amendment not to include foreign currency options. However, the plain meaning of the Treasury Amendment was emphasized by the Fourth Circuit in *Salomon Forex*:

> The phrase 'transactions in foreign currency' is broad and unqualified. Its breadth is confirmed by the 'unless' clause which removes from 'transactions in foreign currency' those

[5] Aside from *Salomon Forex*, *American Board of Trade*, and the decision below, the only other appellate court to have addressed, in some fashion, the applicability of the Treasury Amendment to trading in foreign currency options is *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982). There, during a jurisdictional dispute between the CFTC and the SEC, the Seventh Circuit held that organized exchange trading in options on GNMA securities was within CFTC, rather than SEC jurisdiction. The court specifically stated that it drew "no conclusion as to whether the Treasury Amendment affects any CFTC jurisdiction over options on foreign currency." 677 F.2d at 1154 n.34. Additionally, after the agencies concluded their "CFTC-SEC Jurisdictional Agreement," the decision was vacated as moot. 459 U.S. 1026 (1982). *See also Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582 (7th Cir. 1984) (holding that the Treasury Amendment exempts off-exchange GNMA forward contracts from CFTC jurisdiction).

> transactions which are 'for future delivery conducted on a board of trade.' If Congress meant for the clause 'transactions in foreign currency' to apply only [to] transactions in the commodity itself, it would have no reason to exclude futures transactions conducted on an exchange. The class of transactions covered by the general clause 'transactions in foreign currency' must include a larger class than those removed from it by the 'unless' clause in order to give the latter clause meaning. Thus, because the clause 'unless such transactions involve the sale thereof for future delivery conducted on a board of trade' refers to futures, the general clause 'transactions in foreign currency' must also include futures. Under this analysis, we would have to construe the Treasury Amendment exempting transactions in foreign currency to reach beyond transactions in the commodity itself and to include all transactions in which foreign currency is the subject matter, including futures and options.

Salomon Forex, 8 F.3d at 975-76 (emphasis in original).

Moreover, any interpretation contrary to the Fourth Circuit's analysis would effectively ignore the realities of foreign currency transactions. Both futures and options hedge and/or shift risk, and "it is almost always possible to devise an option with the same economic attributes as a futures contract (and the reverse)." *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 543 (7th Cir. 1989), *reh'g denied, en banc*, U.S. App. LEXIS 16,280, *cert. denied*, 496 U.S. 936 (1990). "Since trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context." *Salomon Forex*, 8 F.3d at 976. Moreover, if Congress had desired to distinguish between the two types of transactions, it easily could have done so.

Accordingly, there is no valid basis on which to differentiate "options" from other forms of "transactions in foreign currency" — both of which are excluded by the Treasury Amendment. "[A]ll off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA." *Id.* at 976 (emphasis added).

B. *The Conflict Among the Circuits Subjects Options in the Multi-Trillion Dollar Off-Exchange Foreign Currency Market to Inconsistent Regulation*

The foreign currency options at issue in this case are part of an established international, off-exchange, interbank market in foreign currency. On any given day, hundreds of billions of dollars' worth of currency are bought and sold (by institutional foreign currency banks, dealers, and speculators) and trillions of dollars' worth of foreign exchange contracts are outstanding. *See* Brief of the Foreign Exchange Committee and the New York Clearing House Association as Amici Curiae at 5-6, *CFTC v. Dunn* (2d Cir.). These trades are entered into individually between the participants — with different specifications and duration, and without any involvement of a formally organized "exchange" or "board of trade."

The lack of uniformity among the circuits places the global foreign currency markets in a state of considerable regulatory uncertainty. If the United States, as well as its banking institutions and foreign currency dealers, are to retain their preeminent position in the international currency markets, such conflicts are best resolved by a definitive statement as to the absence of CFTC jurisdiction over such markets. Indeed, CFTC regulation of the off-exchange foreign currency market would reduce efficiency, inhibit innovation in the development of new financial mechanisms, result in higher costs, and damage the United States' ability to compete in the world market. *See Salomon Forex*, 8 F.3d at 974 (citing arguments of *amici*).

Moreover, the Petitioners urge this Court to recognize that the question presented has significant international economic

consequences. The off-exchange foreign currency market, including trading in options, serves a number of fundamental needs of governments and businesses worldwide. The Federal Reserve, as well as various foreign banks, regularly intervene in that market to implement policies relating to their currencies. Additionally, such a market is essential to the smooth functioning of the global trade in goods and services, which often occurs between entities that conduct transactions in more than one currency. Foreign currency options, in particular, are essential to enable businesses and governments to hedge against the risk of adverse exchange rate movements. *See* Brief of the Foreign Exchange Committee and the New York Clearing House Association as Amici Curiae at 4-6, *CFTC v. Dunn* (2d Cir.).

Finally, the importance of the CFTC's lack of jurisdiction with respect to off-exchange foreign currency options is reflected by the interest expressed by various *amici* — in both *Salomon Forex*[6] and in the submissions to the Second Circuit below.[7] It is also anticipated that *amici* submissions will be filed in support of this petition.

C. *The Judgment of the Court of Appeals Below is Inconsistent with the Position of the United States*

The uncertainty created by the decision below is further exacerbated by the opposing governmental positions concerning the lack of CFTC jurisdiction over the off-exchange for-

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[6] In *Salomon Forex* the Treasury Department, the Securities and Exchange Commission, the Foreign Exchange Committee, the Futures Industry Association, and the Managed Futures Association submitted *amicus curiae* briefs arguing that the CEA should not apply to off-exchange foreign currency options.

[7] In the decision below, similar *amicus curiae* briefs were submitted on behalf of the Foreign Exchange Committee, the New York Clearing House Association, the Futures Industry Association, the Managed Futures Association, Credit Lyonnais, Bank Julius Baer & Co. Ltd., and Chase Manhattan Bank, N.A.

eign currency market. Contrary to the CFTC's contentions,[8] the Treasury Department clearly supported the interpretation of the Treasury Amendment in *Salomon Forex* — as stated in the Amicus Brief of the United States:

> [T]he Treasury Department has a strong interest in an efficient market for foreign currency. A smoothly functioning foreign currency market, with a wide range of participants, is essential to international trade and investment flows. However, a narrowed interpretation of the Treasury Amendment could put into question outstanding transactions, as well as inhibit risk-reducing improvements, such as clearing-house operations, in the foreign currency market. The Treasury, as the agency charged with managing the international financial policy of the United States, has an important interest in preventing the legal uncertainty a narrow interpretation of the Treasury Amendment would introduce into this enormous market, which is an essential component of the international economic system.

App. D, 10d.

[8] However, the CFTC itself previously seems to have recognized the proper scope of the Treasury Amendment, when it cited the 1974 Senate Report to confirm that "'regulation by the [CFTC] of transactions in the specified financial instruments . . . is unnecessary, unless executed on a formally organized futures exchange.'" SEC-CFTC Jurisdictional Correspondence, [1975-77 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,117 at 20,834 n.13 (CFTC Staff Response Dec. 3, 1975) (emphasis added). Thus, the CFTC — at least in the past — appears to have recognized that the Treasury Amendment exemption limits its jurisdiction to exchange traded transactions in foreign currency. *See also Statutory Interpretation Regarding Trading in Foreign Currencies for Future Delivery*, 50 Fed. Reg. 42,983, *reprinted in* [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,750 (CFTC 1985) (where the CFTC explicitly, albeit begrudgingly, seems to have admitted that at least some foreign currency futures transactions are exempted from the Act's coverage by the Treasury Amendment).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[9]

Respectfully submitted,

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January, 1996

[9] Under 28 U.S.C. § 518, Congress has reserved to the Attorney General and the Solicitor General the conduct of litigation in this Court "in which the United States is interested." The Attorney General, in turn, has delegated to the Solicitor General "conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and *in opposition to certiorari*, briefs and arguments, and . . . settlement thereof." 28 C.F.R. § 0.20 (emphasis added). Because the statutory provisions creating the CFTC do not appear to create an exception to the statutory reservation of Supreme Court litigating authority to the Solicitor General (*see* 7 U.S.C. §§ 4a(c), 13a-1(a) & (f)), and the Solicitor General has represented the CFTC in this Court in previous cases (*see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)), we understand that the Solicitor General will represent the United States in this case — including the CFTC. *See Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 540-43 (1994). Accordingly, we have not suggested that the Court invite the views of the Solicitor General, since he will presumably file a brief on behalf of the CFTC and the United States. Nevertheless, we have forwarded a courtesy copy of this petition on the General Counsel of the CFTC, who represented respondent CFTC in the court below.

APPENDIX A

Opinion of the
United States Court of Appeals
for the Second Circuit

58 F.3d 50

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff-Appellee,
v.
William C. DUNN and Delta Consultants, Inc.,
Defendants-Appellants
and
Delta Options, Ltd. and Nopkine Co., Ltd.,
Defendants.

No. 856, Docket 94-6197

United States Court of Appeals,
Second Circuit.

June 23, 1995

Before: WINTER, JACOBS, and CABRANES, Circuit Judges.

WINTER, Circuit Judge:

This is an interlocutory appeal from the appointment of a temporary receiver. The principal legal issue is whether the Commodity Futures Trading Commission ("CFTC") has power to regulate off-exchange options involving foreign currencies. Based on a prior decision of this court binding on this panel, we hold that it does and affirm.

BACKGROUND

This is an action by the Commodity Futures Trading Commission against four defendants: (i) William C. Dunn, an in-

dividual and the president and sole shareholder of Delta Consultants; (ii) Delta Consultants, a New Jersey corporation formed by Dunn in 1974; (iii) Delta Options, Ltd., an investment company incorporated in the Bahamas in 1991, to which Dunn is an advisor and of which he was managing director; and (iv) Nopkine Co., Ltd., an investment company incorporated in the British Virgin Islands in 1993, to which Dunn is an advisor.

Beginning in 1992, some of the defendants solicited investments from a number of individuals, partnerships, and companies. These investors understood that Delta Options would use the money to execute investment strategies involving the purchase and sale of call and put options on various foreign currencies. Through these trades, various combinations of sales and purchases of different forms of options created relatively exotic positions in foreign currencies, including "strangles" and "boxes." These trades were done in the name of defendants, and no participations or options were sold directly to investors.

The defendants' trading took place in the so-called off-exchange market. Such trading is over-the-counter and not conducted on any kind of organized exchange. Rather, the market consists of myriad and interlocking contracts struck over the telephone between dealers and through brokers.

According to affidavits submitted by the CFTC, Dunn and his agents, including A.P. Black Limited, an English firm, disseminated false information concerning the risks and rewards of currency trading in general and of investing with defendants in particular. Investors were also deceived as to the success of defendants' trading and the status of the investors' accounts.

Investors in Delta Options received weekly print-outs summarizing the putative current market value of their particular positions. Until late 1993, these print-outs apparently showed impressive returns on the investments. When options expire, the positions are said to "mature." Prior to the maturity of an investor's position, Delta Options would ask the investor whether the investor wanted to "roll over" the positions or to

cash out. By "rolling over" the positions, the investor would reinvest those funds with defendants. Some investors—including those constituting the partnership of Nobad Investment Currency ("Nobad")—claim that misleading print-outs caused them to "roll over" their investments instead of withdrawing them.

The scheme began to unravel in the second half of 1993, and investors began to receive curious communications from defendants. For instance, in early July 1993, investors received a letter from Delta Options to the effect that the "Investment Management Regulatory Organisation Limited," a British regulatory organization, was investigating A.P. Black Limited. In late July 1993, one investor—an English ship repair agency business named Carlden Marine and Industrial Agencies Limited ("Carlden Marine")—was informed by a letter from Delta Options that it would be repaid in full at the next contract maturity dates. Carlden Marine was thus assured that it would be "cashed out" as its positions matured. Over the next two months, however, the monies were not released as anticipated. Funds representing the positions that supposedly matured on August 27, 1993 were sent to Carlden Marine in the middle of October.

Notwithstanding communications from Delta Options and Dunn that alternated between vague and placating, Carlden Marine never received funds corresponding to positions maturing on September 27, 1993. On November 26, Carlden Marine received a letter from Delta Consultants stating that Delta Options had suffered trading losses of $85 million. On November 28, Carlden Marine received a similar communication from Delta Options, except that losses were set at $95 million. Finally, on December 3, 1993, Carlden Marine received a letter from Delta Options that stated that Delta Consultants could not compensate investors for the losses.

Other investors experienced similar difficulties. The Nobad partnership was informed in July through the "Summary Report of Foreign Exchange Option Positions" sent by Delta Consultants that the maturity of some of its currency positions had been extended to late September. They were

then informed in late September that the funds representing such matured positions would not be paid out until November. In late November, the Nobad partners, like Carlden Marine, received communications from Delta Options indicating massive losses and an inability to repay their money.

On the present record, it would appear that, whatever their original intent, defendants became engaged in an old-fashioned "Ponzi" scheme, accompanied by exotic financial vocabulary. The weekly print-outs suggested large returns, which convinced most investors to "roll over" their funds. So long as these funds and money from new investors exceeded losses, any investor who wished to "cash out" could be paid off. The losses, however, were too great to be offset by "rollovers" or new money, and much of the investors' money has disappeared.

At least some money has been transferred to Switzerland. For example, transfer documents from Credit Lyonnais indicate that Delta Options wired $16.5 million from an account in New York to an account in Zurich, Switzerland in July 1993, while documents from Bank Julius Baer reflect a $3 million transfer from a New York account to a Zurich account.

The present lawsuit was commenced by the CFTC on April 5, 1994. On the same date, the CFTC also applied, *ex parte*, for a restraining order, which was promptly entered by the district court, freezing the defendants' assets. On May 4, 1994, the CFTC requested the appointment of a temporary equity receiver. On May 6, the district court held a hearing on this request. Defendants' sole argument at this hearing was that there was no subject matter jurisdiction because the CFTC has no power to regulate options in foreign currency. After a second hearing on June 23, the district court appointed a temporary equity receiver. Appellants brought this interlocutory appeal, along with a motion to stay the order pending appeal. We denied the stay and expedited this appeal.

DISCUSSION

The CFTC's evidentiary proffer sufficiently demonstrated that defendants deceived investors and caused investors to

receive false reports. Such behavior, when undertaken in the course of conduct over which the CFTC has jurisdiction, is unlawful under 7 U.S.C. § 6c(b). The CFTC also has alleged facts sufficient to find Dunn (i) liable for aiding and abetting such violations and (ii) liable for being a controlling person with respect to such violations. *See* 7 U.S.C. § 13c.

The principal question to be addressed, therefore, is whether the CFTC has the power to regulate options in foreign currency. This turns on whether the trading in off-exchange options on foreign currencies is excluded from the CFTC's jurisdiction by the language of the 1974 amendments to the Commodities Exchange Act ("CEA"). The Commodity Futures Trading Commission Act of 1974 created the CFTC and gave it extensive power to regulate futures and options. *See* Pub. L. No. 93-463, 88 Stat. 1389, *et seq.* (1974). However, this authority was circumscribed with respect to foreign currency by the "Treasury Amendment" of 1974, which reads:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C § 2(ii). The issue is whether or not the phrase "transactions in foreign currency" includes options on foreign currency. If such options are included, then the exemption applies, and the options do not fall within the CFTC's jurisdiction.

This issue is foreclosed by clear precedent in this circuit that holds that the term "transactions in foreign currency" does not include options, even those options traded off-exchange. We addressed this question in *Commodity Futures Trading Commission v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986), and interpreted "transactions in foreign currency"

to exclude options. Our reasoning was that an option was simply the right to engage in a transaction in the future, and, until this right matured, there was no exempt "transaction." The exercise of an option would constitute a "transaction in foreign currency," but the purchase or sale of the option itself would not be such a "transaction" under the Treasury Amendment. *Id.* at 1248-49.

Appellants and *amici* urge that this interpretation was dicta because *American Board of Trade* involved transactions that were non-exempt because they had occurred on an exchange. Therefore, it was not necessary to hold that all options were outside the Treasury Amendment exemption to reach the conclusion that the transactions at issue in *American Board of Trade* fell within the CFTC's jurisdiction.

Appellants and *amici* are correct that we could have altered our reasoning and reached the same result by stating that because the instruments at issue in *American Board of Trade* were traded on an exchange they fell outside the Treasury Amendment. Nevertheless, that was not the path we chose. The fact that a quite different line of reasoning leading to the same result might have been adopted by a prior panel does not give a later panel in this circuit free rein to disregard an earlier decision. When a prior decision makes statements in a line of reasoning that are broader than necessary to the affirmance or reversal of a judgment, a later panel may confine the precedential effect to a narrower ground within the line of reasoning. However, a later panel may not disregard the reasoning of a decision because an entirely different line of reasoning was available. Whatever doubts this panel may have about the interpretation given the Treasury Amendment in *American Board of Trade*, therefore, are not grounds for our declining to follow it. We acknowledge that our interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* conflicts with that of the Fourth Circuit in *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1540, 128 L.Ed.2d (1994). This conflict is for the Supreme Court, not us, to resolve.

Amici warn of a number of potentially dire effects that could result from a holding that off-exchange currency options fall within the subject matter jurisdiction of the CFTC. These dire effects are to a degree deflected by the CFTC's trade option exemption. *See* 17 C.F.R. § 32.4 (limited exemption for commodity options "offered by a person which has a reasonable basis to believe that the option is offered to a producer, processor, commercial user or merchant . . . solely for purposes related to its business as such"). At oral argument, for example, the CFTC represented that the trade option exemption would apply to options in foreign currency traded among banks. In any event, we are bound by precedent.

We have examined appellants' claim that the district court abused its discretion by appointing a temporary receiver. We hold that Judge Griesa's actions were proper and responsible under the circumstances, and appellants' contentions to the contrary are without merit.

Affirmed.

APPENDIX B

Order Appointing Temporary Equity Receiver

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,
v.
William C. DUNN, Delta Consultants, Inc.,
Delta Options, Ltd., and Nopkine Co. Ltd.,
Defendants.

94 Civ. 2403 (TPG)

United States District Court
for the Southern District of New York

June 23, 1994

WHEREAS, Plaintiff Commodity Futures Trading Commission having applied for an Order of this Court appointing a temporary equity receiver in the above-captioned case, and this Court having considered said application and arguments thereon and being fully advised in the premises:

Accordingly, it is HEREBY ORDERED that Michael S. Sackheim is appointed as the Temporary Equity Receiver ("Receiver") and, in such capacity, is authorized:

(1) To take immediate custody, control and possession of the assets and property belonging to, or in the possession, custody or control of, Defendants William C. Dunn, Delta Consultants, Inc., Delta Options, Ltd. ("Delta Options") and Nopkine Co. Ltd. (hereinafter collectively referred to as "the Defendants"), including, but not limited to, books and records of account and original entry, computer and other electronically stored and sorted data, funds, securities, commodity accounts, bank and trust deposit accounts, real and personal property, premises, contents of safety deposit boxes, precious metals, currencies, coins and any other assets or property, wheresoever situated;

(2) To collect and take charge of, hold and administer forthwith all such assets and property subject to further Order of this Court, in order to prevent irreparable loss, damage and injury to customers of said Defendants and to conserve, and prevent the dissipation of, funds;

(3) To locate, freeze, marshal, recover and preserve forthwith all of the assets and property of said Defendants, wheresoever situated, for the benefit of the Defendants' customers, and to make an accounting thereof to this Court; and

(4) To have such other and further powers as this Court, from time to time, may direct.

It is FURTHER HEREBY ORDERED:

(5) That the Receiver shall cooperate in a reciprocal manner, including the reciprocal sharing of such information and documents as may be appropriate and lawful, with Messrs. Macgregor Robertson and Anthony Kikivarakis, in their capacity as the Joint Official Liquidators of Defendant Delta Options in the proceeding captioned *In the Matter of Delta Options Limited and In the Matter of the International Business Companies Act, 1989*, now pending in the Supreme Court of the Commonwealth of the Bahamas, so as to reduce or eliminate any unnecessary duplication of effort and unnecessary expenditure of resources;

(6) That, upon application to, and approval by, this Court, with notice to all parties, Messrs. Macgregor Robertson and Anthony Kikivarakis may be compensated for reasonable disbursements, fees and ex-

penses which they have incurred to date as the Joint Official Liquidators of Defendant Delta Options in *In the Matter of Delta Options Limited and In the Matter of the International Business Companies Act, 1989*, from assets and property of Defendant Delta Options which have been frozen or recovered in this action to date;

(7) That, upon application to, and approval by, this Court, with notice to all parties, the Receiver, and any persons retained by him to assist in performing any of the activities authorized herein, may be compensated for reasonable disbursements, fees and expenses from the assets and property of the Defendants in this action;

(8) That nothing in this Order shall be deemed to prevent Messrs. Macgregor Robertson and Anthony Kikivarakis, as the Joint Official Liquidators of Defendant Delta Options in *In the Matter of Delta Options Limited and In the Matter of the International Business Companies Act, 1989*, from performing their obligations to the Supreme Court of the Commonwealth of the Bahamas, including locating, freezing, marshalling, recovering and preserving assets which they reasonably believe belong to Defendant Delta Options, provided that all such assets, wheresoever located, shall be subject to all outstanding Orders issued by this Court, including, but not limited to, this Court's *Ex Parte Restraining Order*, dated April 5, 1994, except as otherwise provided herein;

(9) That any assets which are located, frozen, marshalled, recovered or preserved by the Receiver or by Messrs. Macgregor Robertson and Anthony Kikivarakis, in their capacity as the Joint Official Liquidators of Defendant Delta Options in *In the Matter of Delta Options Limited and In the Matter*

of the International Business Companies Act, 1989 and are reasonably believed to belong to Defendant Delta Options, shall not be distributed to customers, investors or creditors of Delta Options, unless such distribution has been duly approved by this Court and by the Supreme Court of the Commonwealth of the Bahamas; provided that assets belonging to any of the other Defendants in this action are, and shall remain, subject to this Court only; and

(10) That, except as otherwise provided herein, all outstanding Orders issued by this Court in this action, including, but not limited to, the Stipulation and Order filed on April 20, 1994 and agreed to by the Commission and Defendants William C. Dunn and Delta Consultants, Inc., shall remain in full force and effect, until further notice from this Court.

Done and Ordered at New York, New York, on this 23rd day of June, 1994.

Thomas P. Griesa

THOMAS P. GRIESA
UNITED STATES DISTRICT
JUDGE

MEMORANDUM

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,
v.
William C. DUNN, Delta Consultants, Inc., Delta Options, Ltd., and Nopkine Co. Ltd.,
Defendants.

94 Civ. 2403 (TPG)

United States District Court
for the Southern District of New York

July 1, 1994

On June 24, 1994 the court held a hearing on plaintiff's application for the appointment of a receiver. The arguments for and against the receivership had also been discussed on at least one earlier occasion. On June 24 the court granted plaintiff's application and signed an order appointing the receiver.

The principal opponents of the receivership application were defendants William C. Dunn and Delta Consultants, Inc., represented by Gary D. Stumpp, Esq. Among other things, Mr. Stumpp has contended that the court lacks subject matter jurisdiction in this case. At the June 24 hearing the court stated that it has jurisdiction, and further stated that a formal opinion to that effect would be filed shortly.

In so stating, the court overlooked the fact that on June 15 Mr. Stumpp filed a motion to dismiss the complaint for lack of subject matter jurisdiction and that this motion is returnable on August 10. Plaintiff has not yet responded to this motion.

The court wishes to revise what it said on June 24 with reference to jurisdiction. The court will not issue a formal ruling on jurisdiction until the submissions have been com-

pleted on Mr. Stumpp's motion. Plaintiff should, of course, respond to that motion. However, the court does state that it is sufficiently satisfied on the subject of jurisdiction so that it believes that the appointment of a receiver is proper. The court relies on *Commodity Futures Trading Commission v. The American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986).

Dated: New York, New York
July 1, 1994

Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

APPENDIX C

Order of the
Second Circuit Court of Appeals
Denying Petition for
Rehearing and Suggestion for
Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-five.

CFTC

v · Dkt No: 94-6197

Dunn

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants WILLIAM C. DUNN and DELTA CONSULTANTS, INC.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereof.

FOR THE COURT:
GEORGE LANGE III, CLERK
Arthur M. Heller 9/22/95
By: Arthur M. Heller, Date
Administrative Attorney

APPENDIX D

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN *SALOMON FOREX, INC. V. TAUBER*, NO. 92-1406 (4th Cir.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SALOMON FOREX, INC.,

Plaintiff-Appellee,

v.

LASZLO N. TAUBER, M.D.,

Defendant-Appellant,

LASZLO N. TAUBER, M.D.,

Third-Party Plaintiff-Appellant,

v.

SALOMON BROTHERS, INC., *et al.*,

Third-Party Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1406

SALOMON FOREX, INC.,

Plaintiff-Appellee,

v.

LASZLO N. TAUBER, M.D.,

Defendant-Appellant,

LASZLO N. TAUBER, M.D.,

Third-Party Plaintiff-Appellant,

v.

SALOMON BROTHERS, INC., *et al.*,

Third-Party Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

STATEMENT OF INTEREST OF THE UNITED STATES

On October 23, 1974, the Commodity Exchange Act, 7 U.S.C. 1, *et seq.* ("CEA"), was amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389, *et seq.* ("CFTCA"). The CFTCA broadened the definition of commodities in the CEA to include, in addition to various previously *enumerated* agricultural products,

> all other goods and articles, except onions as provided in Public Law 85-839, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in . . . .

Sec. 201(b), Pub. L. 93-463, 88 Stat. 1395. In addition, the CFTCA created the Commodity Futures Trading Commission ("CFTC"), which assumed the regulatory powers previously exercised by the Secretary of Agriculture in regard to trading in commodity futures contracts.

While the 1974 amendments resulting in the CFTCA were being considered, the Treasury Department proposed to Congress that certain transactions in certain financial instruments be exempted from coverage of the CEA, and, therefore, from the regulatory authority of the CFTC. *See, e.g.*, S. Rep. No. 1131, 93rd Cong., 2d Sess., 49 - 51 (1974). With one exception not relevant here, Congress adopted the Treasury Department's proposal, promulgating as part of the CEA what is now known as the "Treasury Amendment." The Treasury Amendment provides, in relevant part:

> Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights . . . [or] government securities, . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

Sec. 201(b), Pub. L. 93-463, 88 Stat. 1395.

In this case, the district court has reasoned that "well-established principles of statutory interpretation compellingly point to the conclusion that the [subject] contracts between [defendant and plaintiff] are covered by the Treasury Amendment and thus excluded from regulation under the CEA," Joint Appendix ("J.A.") 50, finding that

> the phrase "transactions in foreign currency" [in the Treasury Amendment] plainly and un-

> ambiguously means any transaction, without limitation as to the participants involved, in which foreign currency is the commodity or subject matter . . . .

Ibid. Accordingly, the district court concluded:

> All transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA.

J.A. 56 - 57.

The exclusivity provision and exchange-trading requirement of the CEA confer upon the CFTC exclusive jurisdiction with respect to contracts of sale of a commodity for future delivery and certain other commodity instruments, and makes it illegal to trade futures unless the contract is executed on a designated contract market.[1] Thus, failure to qualify for exemption from the CEA under the Treasury Amendment could preclude the existence of certain off-exchange markets which perform vital financial functions, even where they are subject to oversight by other financial regulatory agencies, such as the Department of the Treasury and the SEC. The United States Department of the Treasury and the Securities and Exchange Commission ("SEC") have important interests in the preservation of the reach of the district court's interpretation of the Treasury Amendment in this case.

* * * * *

A narrowing, or reversal, of the district court's decision would create legal uncertainty which could have an adverse impact upon the market for Treasury securities, and markets for other government securities, as well as on the market for foreign currencies. In addition, narrowing or reversal could produce detrimental limitations on the types of securities the

[1] *See* 7 U.S.C. 2, 6(a).

Treasury, and other issuers of government securities, could market in the future.

In particular, the Treasury Department is concerned that a more narrow interpretation of the Treasury Amendment in this case would create legal uncertainty for the "when-issued" market for Treasury securities — a crucial part of the distribution and pricing mechanism for marketable Treasury securities at original issuance.

"When-issued" trading consists of agreements, entered into between participants in the Treasury securities market, to purchase and sell Treasury securities prior to their issuance, at an agreed upon yield or price. Ordinarily, when-issued trading is conducted between the date of the announcement by the Treasury Department of a scheduled auction of a security, and the settlement — or issuance — date for that security.[2] In recent years, the Treasury Department has conducted over 150 auctions each year, and, on any given day, several different Treasury issues may be the subject of trades on the when-issued market, with a substantial volume being traded.

When-issued trading fulfills several crucial functions in the primary distribution process for Treasury securities. First, it serves as an important price discovery mechanism for a security to be auctioned, allowing auction participants to bid more confidently. When-issued trading also reduces informational advantages, and inequalities of informational access, among potential bidders in the auctions, and provides auction participants the opportunity to hedge positions acquired in the auction. Finally, the availability of when-issued trading

[2] Delivery of the securities subject to when-issued trades takes place on the issuance date of the security. In some instances, the need for actual delivery of the securities is eliminated by the parties' entering into offsetting when-issued transactions. In addition, when-issued transactions between netting members of the Government Securities Clearing Corporation ("GSCC") are settled on a net basis. The GSCC membership comprises primarily the interdealer market. As GSCC becomes the counterparty to all transactions which it nets, it subjects when-issued, and other trades which create market exposure for GSCC, to daily margining requirements.

significantly increases flexibility in the timing of Treasury securities purchases for portfolio managers and other large investors, by offering an alternative to their bidding directly in auctions. Available data suggest that a significant portion of an offering of Treasury securities is sold to final investors before the auction. When-issued trading offers these important ultimate purchasers a mechanism for avoiding the potential price and quantity risks of auction bidding.

For these reasons, the smooth functioning of the when-issued market in Treasury securities contributes directly to the success and to the fairness of the auctions. This increases the overall liquidity and efficiency of the Treasury securities market, and contributes to the financing of the federal debt at the lowest possible cost to the Treasury, and ultimately to the taxpayer. The affirmation by the district court in this case that the Treasury Amendment would exempt from coverage of the CEA "all transactions" in the instruments enumerated in the Treasury Amendment essentially protects these several interests the Treasury Department has in the government securities market.

A narrower interpretation of the Treasury Amendment in this case could have adverse impact on matters of concern to the Treasury Department, beyond the deleterious impact upon the present market for Treasury securities. Such an interpretation could inhibit market innovation in the development of new mechanisms for trading government securities, and could reduce the flexibility in the development of new types of Treasury securities. These restrictions could, in turn, reduce market efficiency for Treasury securities and other government securities in the future, thereby increasing the cost of financing.[3]

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[3] For example, the Treasury might, in the future, determine that it would be advantageous to issue securities which are indexed to the price of a commodity. A narrow interpretation of the Treasury Amendment could preclude trading such a security in the over-the-counter market, or could even preclude the Treasury from issuing such a security, if the structure of the security meant that it was viewed as an instrument governed by the CEA.

In addition to being the issuer of the public debt, and having important interests in the smooth functioning of the government securities market, which minimizes the government's financing costs, the Treasury Department has an interest in this case stemming from its role as rulemaker for government securities brokers and dealers under the Government Securities Act of 1986 ("GSA").[4] A narrow interpretation of the Treasury Amendment, which would create legal uncertainties with regard to transactions in the government securities market, could engender further, and detrimental, confusion about the Treasury's authority to regulate government securities brokers and dealers with respect to such transactions.

Finally, the Treasury Department has a strong interest in an efficient market for foreign currency. A smoothly functioning foreign currency market, with a wide range of participants, is essential to international trade and investment flows. However, a narrowed interpretation of the Treasury Amendment could put into question outstanding transactions, as well as inhibit risk reducing improvements, such as clearinghouse operations, in the foreign currency market. The Treasury, as the agency charged with managing the international financial policy of the United States, has an important interest in preventing the legal uncertainty a narrow interpretation of the Treasury Amendment would introduce into this enormous market, which is an essential component of the international economic system.

Thus, any narrowing of the exclusionary coverage of the Treasury Amendment as pronounced by the district court —

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[4] Pub. L. 99-571, 100 Stat. 3208 (1986). The GSA established a federal system for the regulation of the government securities market, including previously unregulated brokers and dealers. *See generally*, Department of the Treasury, Securities and Exchange Commission, and Board of Governors of the Federal Reserve System, *Study of the Effectiveness of the Implementation of the Government Securities Act of 1986*, pp. 1-3 (October 1990) (describing regulation of government securities market). Treasury's rulemaking authority lapsed on October 1, 1991; however, legislation is pending to renew it.

including the imposition of a limitation based upon the identity of a participant — would have a detrimental impact upon these several markets, and would create significant uncertainty among market participants.

* * * * *

The Securities and Exchange Commission advises us that it supports the positions of the United States in this case. The SEC is the agency responsible under the federal securities laws for regulation of transactions in securities and options "on any security . . . or group or index of securities (including any interest therein or based on the value thereof)," and for the administration and enforcement of those laws.[5] The SEC's regulation of trading in these securities and options involves oversight of securities exchanges and off-exchange (over-the-counter) markets, as well as market professionals and intermediaries such as securities broker-dealers (including government securities dealers) and securities and option clearing agencies (including clearing agencies which clear and settle trades in government securities, options on U.S. Treasury securities, and options on foreign currency).

The scope of the Treasury Amendment's statutory exclusion from the CEA encompasses transactions in a variety of securities, such as "security warrants," "security rights," and "government securities."[6] The Court's interpretation of the Treasury Amendment in this case will have a direct impact

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[5] *See* Section 9(g) of the Securities Exchange Act, 15 U.S.C. 78i(g) ("Exchange Act"). Options relating to foreign currency traded on a national securities exchange are defined as "securities" for the purposes of the Exchange Act. *See* 15 U.S.C. 78c(a)(10). The Exchange Act confers on the SEC jurisdiction over such trading, 15 U.S.C. 78i(g), and such trading is expressly excluded from the coverage of the CEA. *See* 7 U.S.C. 6c(f).

[6] The SEC shares regulatory authority with respect to the trading of government securities with the Treasury Department and federal financial institution regulatory authorities. *See generally*, Study, *supra*, n.4.

on the Amendment's application to off-exchange trading of all instruments enumerated in the Amendment. Accordingly, the interpretation will have important consequences for the SEC's regulatory jurisdiction as related to securities and securities-derivative products as comprehended within the Amendment, and for market participants subject to SEC oversight.

The SEC's regulatory jurisdiction with respect to certain securities-derivative products was expressly clarified by Congress in 1982 and 1983 through enactment of the SEC-CFTC Accord, which resolved certain jurisdictional disputes between the SEC and the CFTC with respect to options on securities and other securities-derivative products.[7] Taken together, the Accord Amendments and the earlier enacted Treasury Amendment represent a comprehensive jurisdictional scheme adopted by Congress in consultation with the regulatory agencies affected.

The SEC has a strong interest in ensuring proper interpretation of the Treasury Amendment to clarify the CEA's applicability to securities and securities-derivative products regulated by the SEC. Narrowing the exclusionary coverage of the Treasury Amendment, as urged by defendant (and thereby expanding the potential sweep of the CEA exclusivity provision), has a serious potential for disrupting securities markets, and for causing uncertainty and confusion for market participants.

* * * * *

For these reasons, the United States has a strong and important interest in having this Court affirm the district court's interpretation of the Treasury Amendment.

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[7] *See* Act of Oct. 13, 1982, Pub. L. No. 97-303, 96 Stat. 1409 (amending the federal securities laws); Act of Jan. 11, 1983, Pub. L. No. 97-444, 96 Stat. 2294 (amending the CEA).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Although appellant presents additional issues for this Court's review, this brief addresses only the following issue:

> Whether the district court properly held that the foreign currency trading contracts entered into between plaintiff and defendant herein are exempt from regulation under the Commodity Exchange Act, as amended, 7 U.S.C. § 1, *et seq.* (1980 & Supp. 1992).

STATUTORY PROVISION INVOLVED

7 U.S.C. § 2 provides, in relevant part:

> . . . . Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. The term "future delivery," as used in this chapter, shall not include any sale of any cash commodity for deferred shipment or delivery.

STATEMENT OF THE CASE[8]

This case arises out of a protracted series of transactions between plaintiff, Salomon Forex, Inc., a prominent foreign currency trading company, and defendant, Laszlo Tauber.

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[8] This statement is limited to matters which are relevant to the issue which *amicus* will address.

Defendant is a general surgeon with an active practice in Northern Virginia, who is also both a major real estate investor, owning a 75% interest in a company which is one of the federal government's largest private landlords, and a major foreign currency trader. J.A. 40-41.[9] Since 1981, defendant has engaged in billions of dollars of foreign currency trading, involving at least 14 well-known companies, including his wholly-owned foreign currency trading company which has a seat on the nation's largest foreign currency exchange. *Ibid.*

As described by the district court, plaintiff and defendant executed off-exchange futures and options contracts. J.A. 42.[10] These contracts were secured by defendant with various forms of collateral; however, plaintiff ultimately sought greater collateral from defendant, which defendant agreed to deliver, but did not, causing plaintiff to decline to enter any further contracts, and to permit the existing contracts to mature. J.A. 44. Upon maturation, defendant's collateral was worth over $20 million less than the amount due plaintiff, and plaintiff brought this action to recover the difference. *Ibid.* Relevant to this matter was the defense that the subject transactions, which were not conducted on or subject to the rules of a board of trade designated by the CFTC as a contract market for trading futures contracts in the commodity involved, were illegal contracts under the CEA, and, therefore, unenforceable.[11] Plaintiff, however, contended that the transactions were governed by the Treasury Amendment, and, therefore, not subject to the CEA.

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[9] The district court suggests that defendant's net worth is in excess of half a billion dollars. J.A. 41.

[10] The "futures" contracts — which may have been "cash forward" contracts, within the meaning of 7 U.S.C. § 2, which are exempted from the CEA (*ibid.*) — were for purchase or sale on a specific future date of a specified amount of currency at an agreed price; the option contracts consisted of purchasing the right to buy or sell a specific amount of foreign currency in the future at an agreed price.

[11] *See* 7 U.S.C. § 6.

The district court agreed with plaintiff. Properly starting with "the language of the statute itself," J.A. 49, the court reasoned that "well-established principles of statutory interpretation compellingly point to the conclusion that the [subject] contracts between Tauber and Salomon Forex are covered by the Treasury Amendment and thus excluded from regulation under the CEA." J.A. 50. Accordingly, the district court held that

> the phrase "transactions in foreign currency" [in the Treasury Amendment] plainly and unambiguously means any transaction, without limitation as to the participants involved, in which foreign currency is the commodity or subject matter . . . .

Ibid.

The district court rejected defendant's argument that legislative history established a limitation upon the participants, observing that the Amendment's "plain language is not qualified in any respect to limit the covered participants," J.A. 51, and that the legislative history, "taken as a whole . . . reveals no clear and unambiguous expression of legislative intent," J.A. 53, to limit the covered participants. *Ibid.* Accordingly, the district court concluded that

> [a]ll transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA.

J.A. 56-57.

Amicus will address only the issue of the reach and coverage of the Treasury Amendment, as defined by the district court.

STANDARD OF REVIEW

The proper interpretation of a statute as required by the issue here is purely a question of law, which is reviewed *de novo* by this Court. *See Basch* v. *Westinghouse Electric Corporation*, 777 F.2d 165, 169 n.5 (4th Cir. 1985).

ARGUMENT

THE DISTRICT COURT CORRECTLY INTERPRETED THE TREASURY AMENDMENT

1. The district court correctly followed the applicable canons of statutory construction.

The district court correctly interpreted the Treasury Amendment, pronouncing that

> the phrase "transactions in foreign currency" [in the Treasury Amendment] plainly and unambiguously means any transaction, without limitation as to the participants involved, in which foreign currency is the commodity or subject matter . . . .

J.A. 50. Further, the district court concluded that, whether structured as a future contract or an option,

> [a]ll transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA.

J.A. 56-57. In so interpreting the statute, the district court properly was governed by the "familiar canon of statutory construction,"

> the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *and see Russello* v. *United States*, 464 U.S. 16, 20 (1983); Jt. App. 49-50.

In this case, "the language of the statute itself" unqualifiedly excludes from coverage of the CEA "transactions in foreign currency, [*etc.*], unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2. Therefore, "absent a clearly expressed legislative intention to the contrary," the district court could only conclude, as it did, that transactions in foreign currency are excluded from the CEA "without limitation as to the participants involved." Jt. App. 50.

According to the "time-honored" rule, "when the language of a statute is clear, there is no need to rely on its legislative history."[12] Nonetheless, the district court went further, and correctly demonstrated that nothing in the legislative history of the Treasury Amendment can be interpreted as a "clearly expressed legislative intention" to create a limitation "as to the participants involved." First,

> in a letter to the [Senate] Committee [on Agriculture and Forestry] dated July 30, 1974, the Department of Treasury recommended that a provision be included in the legislation [to become the CFTCA] exempting, from regulation by the Commission, foreign currency futures trading other than on organized exchanges.

S. Rep. No. 93-1131, 93d Cong., 2d Sess. 49 (1974). Further, the letter to the Committee concluded with Treasury's "strongly urg[ing]" the Committee to

> amend the proposed legislation to make clear that its provisions would not be applicable to futures trading in foreign currencies or other

[12] *First United Methodist Church* v. *U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), citing *Ex Parte Collett*, 337 U.S. 55, 61 (1949).

> financial transactions of the nature above other than on organized exchanges.

Id. at 51.

What is most important about this "provision," which was enacted as the "Treasury Amendment," with only a minor change, not relevant here,[13] as the district court correctly observed, is that its "plain language is not qualified in any respect to limit the covered participants." Jt. App. 51. Accordingly, the inquiry can properly stop at this point, since "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *In re Moore*, 907 F.2d 1476, 1479 (4th Cir. 1990), quoting *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803, 808 - 809 n. 3 (1989).

Moreover, further investigation into the legislative history does not reveal "a clearly expressed legislative intention to the contrary," *Consumer Product Safety Commission*, *supra*, 447 U.S. at 108, sufficient to permit passing over the unambiguous language of the statute. As the district court pointed out, the legislative history suggests nothing other than a combination of factors and goals comprehended in the enactment of the Treasury Amendment. *See, e.g.*, S.Rep. No. 1131, *supra*, pp. 6, 23, 31, 49 - 50, 51; *and see* Jt. App. 52 n.14.

Further, the district court properly obeyed still another important rule of statutory construction, implicitly agreeing that "[w]here legislative history is inconclusive, it should not be relied upon to supply a provision not expressly in the statute." *Beyer* v. *C.I.R.*, 916 F.2d 153, 157 (4th Cir. 1990), citing *United States* v. *American College of Physicians*, 475 U.S. 834, 846 (1986).

Finally, the district court faithfully heeded the warning of the Supreme Court that an "attempt at the creation of legislative history through the *post hoc* statements of interested onlookers is entitled to no weight." *Western Air Lines* v. *Board of Equalization*, 480 U.S. 123, 130 - 131 n. * (1987). Thus, the district court was unpersuaded by defendant's efforts to

[13] *Compare id.*, at 51 ("Nothing in the Act . . . . board of trade.") with 7 U.S.C. § 2 (Treasury Amendment).

shift the interpretive focus from the language of the statute to interpretations fashioned after passage of the Act, which were at variance with the language of the Act. *See*, *e.g.*, Jt. App. 53 - 54 n.15.[14]

In sum, the district court properly began with the language of the statute itself. Jt. App. 49, 50. Then, finding that the language unambiguously did *not* limit exclusion from the coverage of the CEA on the basis of the nature of the participant in the transaction, Jt. App. 50, the district court reviewed the legislative history in search of a "clear, unambiguous basis for concluding, as [defendant] insists, that 'transactions in foreign currency' contains a limitation on the transactional participants." Jt. App. 51. Then the court correctly found that "the legislative history reveals no [such] clear unambiguous expression of legislative intent to restrict the Treasury Amendment." Jt. App. 53.

The conclusion is ineluctable, therefore, that the district court was correct, when concluding:

> Applied here, these well-established principles of statutory interpretation compellingly point to the conclusion that the foreign currency contract between [defendant] and [plaintiff] are covered by the Treasury Amendment .... Simply put, in the CEA context, the phrase "transaction in foreign currency" plainly and unambiguously means any transaction, without limitation as to the participants involved, in the commodity or subject matter ....

Jt. App. 50.

This Court should, therefore, affirm the district court's interpretation of the Treasury Amendment.

2. Defendant's attempt to fashion a new statutory interpretation is wholly without merit.

While defendant sought unsuccessfully to persuade the district court that the Treasury Amendment should be interpreted as if it "contains a limitation on the transactional participants," Jt. App. 51, he now requests from this Court a *different*, and unlikely, interpretation of the Treasury Amendment — to wit, that the Amendment was *not* intended to exclude foreign currency futures and options from the coverage of the CEA, and from the regulatory authority of the CFTC. Rather, defendant *now* argues, the Treasury Amendment, and, therefore the "provision" submitted by the Treasury Department, *see*, S. Rep. No. 93-1131, *supra*, at 49, was intended to exclude *only* "a 'spot' transaction — which involves an immediate sale and conveyance — [and] a 'cash forward' transaction, which also involves a present sale, with delivery merely deferred though fully expected." Brief for Appellant, p.14. As defendant now puts it, "only these . . . transactions, in which the parties buy and sell, and plan conveyance of, the actual commodity, the Treasury Amendment covers." *Ibid.*; *and see*, *id.*, pp. 13 - 32.

This new interpretation is insupportable. First, the entire import of the CEA, since its origin in the Future Trading Act, 42 Stat. 187 (1921), and in every subsequent version of the statutory scheme, has been to "oversee the volatile and esoteric *futures* trading complex." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 356 (1982) (emphasis supplied). Thus, the various statutes have *always* excluded from the overall regulatory scheme transactions which defendant now describes as being uniquely excluded by the Trea-

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[14] In any event, the Treasury Department's statutory interpretation has been in precise accord with the district court's interpretation of the reach of the Treasury Amendment. Compare, *e.g.*, Jt. App. 56 - 57 ("All transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA.") *with* Letter of Charles O. Sethness, Assistant Secretary of the Treasury, May 5, 1986, ("By its terms, the Treasury Amendment exemption is a transactional one that places outside the coverage of the Act "all off-exchange future transactions in the listed financial instruments."), forwarding Comments of Treasury Department in Response to "Commodity Futures Trading Commission, Trading in Foreign Currencies for Future Delivery, Statutory Interpretation and Request for Comments," 50 Fed. Reg. 42983 (October 23, 1985). (For the convenience of the Court, a copy of the Treasury Response of May 5, 1986, is attached as an Addendum).

sury Amendment — that is, transactions "in which the parties buy and sell, and plan conveyance of, the actual commodity." Brief for Appellant, p. 14.

Indeed, the sentence immediately following the Treasury Amendment in the current version of the CEA is the present-day version of that ever-present exclusion:

> The term "future delivery," as used in this chapter, shall not include any sale of any cash commodity for deferred shipment or delivery.

7 U.S.C. § 2.[15] Common sense dictates the conclusion that Congress could not have intended the Treasury Amendment to exclude only spot and cash forward transactions, as defendant now argues, when the very next sentence of the present statute — a sentence which antedated the Treasury Amendment — does, and has always done, precisely that.

Defendant purports to support this remarkable argument by resorting to a variety of efforts to reduce the Treasury Amendment to ambiguity, and then to create out of whole cloth a legislative "history" dedicated to the notion that Congress meant to exclude only spot and cash forward transactions by both the Treasury Amendment *and* the immediate next sentence. These arguments need not be addressed in detail here, as they all fall before two simple truths. First, the CEA's design to "oversee . . . *futures* trading," *Curran*, *supra*, dictates that, in the first instance, an *exclusion* from the Act's coverage would be an exclusion of "futures" transactions.[16]

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[15] This exclusion is ordinarily referred to as the "cash forward" exclusion.

[16] The "cash forward" exclusion itself originated, in the 1921 Future Trading Act, out of concern over assuring the legitimacy of cash grain contracts between farmers and grain elevator operators for the *future* delivery of grain. *See* Hearings on H.R. 5676 Before the Senate Committee on Agriculture and Forestry, 67th Cong., 1st Sess. 8 - 9, 213 - 214, 431, 462 (1921). The present expression, unchanged since the adoption of the CEA in 1936, by referring to "any cash commodity for deferred shipment or delivery," 7 U.S.C. § 2, retains, for cash forward transactions, this sense of future delivery, while also excluding spot transactions as "cash commodity" sales.

Accordingly, those transactions excluded by the Amendment would plainly include "futures" transactions, unless there were a clear and unambiguous basis in the legislative history for concluding otherwise. As shown above, however, there is no such basis.

Rather, the legislative history clearly and unambiguously establishes the second truth which defendant ignores — that the Treasury Amendment was proffered and enacted to "exempt[ ], from regulation by the Commission, foreign currency *futures* trading . . . ." S. Rep. No. 93-1131, *supra*, p. 49 (emphasis supplied); *see also id.*, p. 51 ("we strongly urge the Committee to amend the proposed legislation to make clear that its provisions would not be applicable to *futures* trading in foreign currencies or other financial transactions . . . described above") (emphasis supplied).

Accordingly, the interpretation of the Treasury Amendment defendant has now offered this Court should be rejected, and the district court's adopted.

Defendant also seeks to support his argument that futures and options contracts in foreign currency are not "transactions *in* foreign currency" within the meaning of the Treasury Amendment through reliance upon language in *Board of Trade of the City of Chicago* v. *Securities and Exchange Commission*, 677 F.2d 1137, 1154 n.33 (7th Cir. 1982), *judgment vacated as moot and remanded with directions to dismiss*, 459 U.S. 1026 (1982) and *Commodity Futures Trading Commission* v. *American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986). However, those decisions rest upon a mistaken interpretation of the Treasury Amendment according to which options on foreign currency or government securities, absent exercise, are not deemed "transactions in," but only as involving or relating to, a commodity. The majority's reasoning in *Board of Trade of the City of Chicago* — which *American Board of Trade* simply assumed was valid — can-

not be reconciled with the statutory purpose of the Amendment.[17]

In petitioning the Supreme Court for review of the Seventh Circuit's decision, the Solicitor General asserted that the court incorrectly interpreted the Treasury Amendment, stating that options on government securities were within the Amendment's "transactions in" language.[18] Congress itself overruled the outcome of *Board of Trade of the City of Chicago* in enacting the Accord Amendments discussed previously (*supra*, n. 7).[19] Following Congress's rejection of the Seventh Circuit decision, the Supreme Court vacated it as moot, and directed the action dismissed, thereby depriving *Board of Trade of the City of Chicago* of further precedential authority.

This Court, however, need not address the correctness of *Board of Trade of the City of Chicago* or *American Board of Trade* because, as the district court found, J.A. 54, even under the "semantical" distinction made in those decisions, the options contracts nonetheless fell within the exclusion of the Treasury Amendment.

The district court correctly pointed out that both *Board of Trade of the City of Chicago* and *American Board of Trade* are in agreement on one important point — a transaction "be-

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[17] Indeed, the dissent in *Chicago Board of Trade* made precisely that point, noting that "[t]he majority's suggestion that 'transactions in . . . government securities' covers only transactions in which the underlying securities change hands [is] flatly contradicted by the structure of [the Treasury Amendment]." *Id.*, 677 F.2d at 1178 - 1179 (Cudahy, J., dissenting) (ellipsis in original).

[18] *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, *Securities Exchange Commission* v. *Board of Trade of the City of Chicago*, No. 82-526 (S. Ct.), at 21 & n. 21.

[19] *See* H.R. Rep. No. 626, 97th Cong., 2d Sess. 7 (1982) ("The dissenting opinion (Cudahy) noted that the majority's decision reflected a 'bizarre' and 'extreme' conclusion. The Committee believes the court's decision is not consistent with long-standing Congressional intent that the SEC has the sole authority to regulate options on all securities, including exempted [*e.g.*, government] securities.").

comes one 'in' foreign currency," once the subject contract is exercised, as were the contracts in question in this case. J.A. 55. Defendant does not disagree at this time, nor does he argue here that a triable issue of fact exists as to whether the contracts were exercised. Rather, defendant's argument related to the exercise of the contracts is his contention that, without delivery of the currency itself, the subject contracts could not be considered "exercised." Brief for Appellant, p. 21 n.13.

However, this argument ignored settled law, and has no real impact upon the conclusion reached by the district court. As the district court reasoned, the parties substituted "offsetting transactions [for the] actual receipt or delivery of [the] foreign currency." Jt. App. 55. The court then concluded that this "set-off is, in legal effect, a delivery." *Ibid.*, citing *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 248 (1905). Such delivery, the court concluded, is exercise of the subject contracts causing them, at that time, even if, *arguendo*, not before, to be "transactions in" foreign currency.

Thus, even accepting, for the purpose of argument, the interpretation of the Treasury Amendment fashioned in *Board of Trade of the City of Chicago* and *American Board of Trade*, *supra*, the subject transactions were "transactions in" foreign currency, and, therefore, subject to the exclusionary force of the Treasury Amendment.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's interpretation of the Treasury Amendment.

Respectfully submitted,

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AUGUST 1992

ADDENDUM

Letter of Charles O. Sethness, Assistant Secretary of the Treasury, May 5, 1986, forwarding Comments of Treasury Department in Response to "Commodity Futures Trading Commission, Trading in Foreign Currencies for Future Delivery, Statutory Interpretation and Request for Comments," 50 Fed. Reg. 42983 (October 23, 1985).

DEPARTMENT OF THE TREASURY
WASHINGTON

May 5, 1986

ASSISTANT SECRETARY

Dear Chairman Phillips:

As you know, an existing provision of the Commodity Exchange Act known as the Treasury Amendment provides an exemption for off-exchange futures transactions in foreign currency, government securities and certain other financial instruments. The interpretative statement concerning this Amendment that was published for public comment late last year by the Commodity Futures Trading Commission (the "Commission") would limit the overall scope of the exemption in an effort to eliminate the marketing to the general public of off-exchange futures transactions in foreign currency. See 50 Fed. Reg. 42,983 (1985).

While we agree that it may be appropriate to bring some foreign currency futures transactions marketed to the general public off-exchange within the scope of the Commodity Exchange Act (the "Act"), the possibility that the same narrow interpretation of the Treasury Amendment might be applied to transactions in government securities is of concern to Treasury. The issue was mentioned to Ken Raisler, the Commission's General Counsel, earlier this year in an informal discussion of the Commission's interpretative statement. Our concern has increased substantially because we recently learned that the Commission plans to refine its earlier interpretation of the Treasury Amendment and republish it in the near future, in spite of numerous negative comments received from the public.

By its terms, the Treasury Amendment exemption is a transactional one that places outside the coverage of the Act all off-exchange futures transactions in the listed financial in-

struments. In its interpretative statement, the Commission would limit the exemption to transactions between sophisticated and informed institutions. However, the Treasury Amendment itself contains no language limiting the coverage of the exemption based upon the characteristics of participants in a transaction.

Although the Commission has stated in its recently published release that it "deals only with that portion of the Treasury Amendment which refers to transactions in foreign currency," the analysis of the interpretation logically could extend to transactions in government securities as well as all the other financial instruments listed in the Treasury Amendment.[20] If so extended, it would conflict with a basic goal of Treasury's current legislative proposal that Treasury be the centralized rule making authority in regulating the government securities market.

Because we believe that the Commission's interpretation is not consistent with the plain language of the statute, the appropriate way to permit the regulation in the area of foreign currency transactions is to amend the exemptive provision to redefine its scope with respect to transactions in foreign currency. Although Treasury has no basic objection to bringing within the scope of the Act only the foreign currency transactions of concern to the Commission, we do believe that the Commission's jurisdiction should be defined in such a way that it does not prohibit legitimate hedging transactions entered into by businesses and individuals.

We understand that Congress currently has under consideration legislation that would make a number of amendments to the Act, including at least one amendment that would resolve a question as to the scope of the Commission's power to prevent fraudulent off-exchange futures contracts. We believe

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[20] We note that the interpretative release makes clear that forward contracts will continue to fall outside the scope of the Act. However, the line between futures contracts and forward contracts is not a precise one.

the current bill also is an appropriate vehicle for resolving the issue described above, and we recommend that a provision be added to the bill to make that change. Given our interest in the continued efficient operation of the markets for both foreign currency and Treasury securities, we would be happy to work with you and your staff in crafting a proposed amendment on this issue to be forwarded to the appropriate Congressional committee.

Sincerely,

Charles O. Sethness

Charles O. Sethness
Assistant Secretary
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 1992, I served the foregoing Brief for the United States as *Amicus Curiae* upon counsel of record by causing two copies to be mailed, by first class mail, postage prepaid, to:

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No. 95-1181

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,
PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE COMMODITY FUTURES TRADING COMMISSION AND FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the "Treasury Amendment" to the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, which provides in pertinent part that "[n]othing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency * * * unless such transactions involve the sale thereof for future delivery conducted on a board of trade" (7 U.S.C. 2(ii)), prevents the Commodity Futures Trading Commission from bringing a judicial enforcement action arising from alleged fraud in the solicitation of investments in foreign currency options outside of an organized exchange.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 58 F.3d 50. The order and memorandum of the district court (Pet. App. 1b-6b) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A petition for rehearing was denied on August 4, 1995 (Pet. App. 1c-2c). On December 12,

1995, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including January 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, provides as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. 2(ii).

STATEMENT

The Commodity Futures Trading Commission (CFTC) brought suit in the United States District Court for the Southern District of New York against petitioners William C. Dunn and Delta Consultants, Inc. (as well as two additional corporate defendants), charging them with fraud in connection with commodity option transactions, in violation of the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and associated regulations. See 7 U.S.C. 6c(b); 17 C.F.R. 32.9. The district court granted the CFTC's motion for the appointment of a temporary receiver, Pet. App. 1b-6b, and petitioners sought appellate review under 28 U.S.C. 1292(a)(2). The court of appeals affirmed the district court's order, rejecting petitioners' argument that the CFTC lacks regulatory

jurisdiction over transactions in foreign currency options that are not conducted on an organized exchange. Pet. App. 1a-7a.

1. This Court has previously described the history of commodity futures regulation. See *CFTC* v. *Schor*, 478 U.S. 833, 836-837 (1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 355-367 (1982). Commodity futures originated in the needs of farmers and their customers to fix the price of agricultural products before harvest and delivery. See *Merrill Lynch*, 456 U.S. at 357-358. Those needs led to the organization of commodity futures exchanges, which provided price discovery and hedging functions for commodity producers and processors and speculative opportunities for investors. *Id.* at 359-360. See also S. Rep. No. 1131, 93d Cong., 2d Sess. 11-14 (1974).

During the 1920s, Congress began to impose limitations on trading in grain futures to prevent price manipulation and fraud. See Future Trading Act, ch. 86, 42 Stat. 187 (1921); Grain Futures Act, ch. 369, 42 Stat. 998 (1922). Congress expanded those measures through the Commodity Exchange Act of 1936, ch. 545, 49 Stat. 1491, which regulated futures trading in a variety of agricultural commodities. See *Merrill Lynch*, 456 U.S. at 360-363. As its central feature, the CEA required that all trading in futures respecting those commodities take place through government-designated exchanges ("contract markets") that were subject to specific statutory and regulatory requirements. See ch. 545, §§ 5-9, 49 Stat. 1492-1500. Congress amended the CEA in certain respects in 1968 (Act of Feb. 19, 1968, Pub. L. No. 90-258, 82 Stat. 26), but it retained the Act's basic structure. See *Merrill Lynch*, 456 U.S. at 364-365.

Six years later, Congress substantially revised the CEA through the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389. See *Merrill Lynch*, 456 U.S. at 364-367. The 1974 legislation amended the CEA in two respects that are especially pertinent to this case. First, the 1974 legislation established the CFTC as an independent agency charged with implementing and enforcing the Act. See § 101, 88 Stat. 1389. Second, that legislation substantially broadened the reach of the CEA by defining the term "commodity" to include non-agricultural products. See § 201, 88 Stat. 1395.[1]

During Congress's consideration of the 1974 amendments, the Acting General Counsel of the Department of the Treasury wrote to the Senate Committee on Agriculture and Forestry to express concern that, as a result of the proposed expanded definition of the term "commodity," financial instruments such as foreign currency futures and government securities which were then generally traded among dealers, banks and other sophisticated institutions, would become subject to unnecessary regulation by the newly-created CFTC. See S. Rep. No. 1131, *supra*, at 49-51. The Treasury Department proposed that the legislation be amended to exclude transactions in foreign currency and other specified financial instruments. *Ibid.* Congress responded by incorporating the Department's proposed statutory

[1] Congress has since amended and recodified the CEA through the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865; the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294; the Futures Trading Act of 1986, Pub. L. No. 99-641, 100 Stat. 3556; the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590; and the CFTC Reauthorization Act of 1995, Pub. L. No. 104-9, 109 Stat. 154.

language (with slight modifications) into what is now Section 2(a)(1)(A)(ii) of the CEA, 7 U.S.C. 2(ii). That provision, which has since become known as the "Treasury Amendment," is the focus of the current dispute.

3. The CFTC filed a complaint in federal district court charging petitioners (as well as two additional corporate defendants) with fraud in connection with commodity option transactions, in violation of the CEA and associated CFTC regulations. See 7 U.S.C. 6c(b); 17 C.F.R. 32.9. The complaint charged Dunn and each corporation with making misrepresentations to existing and prospective customers concerning the likelihood of profit and loss associated with trading commodity options and the true status of their invested funds. The complaint also charged Dunn individually with liability for the corporations' fraud as an aider and abettor, in violation of 7 U.S.C. 13c(a), and as a controlling person, under 7 U.S.C. 13c(b). See Pet. App. 4a-5a.

The CFTC moved the district court to appoint a temporary equity receiver to locate, preserve, and control all four defendants' property for the benefit of customers. That request was based primarily upon the serious allegations of fraudulent conduct, the apparent disappearance of more than $180 million of customer funds, and the defendants' transfer from the United States to Switzerland of at least $19.5 million shortly before their fraudulent scheme unraveled. On June 23, 1994, the district court granted the request for appointment of a temporary receiver. Pet. App. 1b-4b. In a separate memorandum, the district court concluded that its jurisdiction to enter the receivership was proper under *CFTC* v. *American Bd. of*

Trade (*ABT*), 803 F.2d 1242 (2d Cir. 1986). Pet. App. 5b-6b.

4. The court of appeals affirmed the district court's appointment of a temporary receiver. Pet. App. 1a-7a. In relevant part, the court found, based upon the record developed to that date, that

> whatever their original intent, defendants became engaged in an old-fashioned "Ponzi" scheme, accompanied by exotic financial vocabulary. The weekly print-outs suggested large returns, which convinced most investors to "roll over" their funds. So long as these funds and money from new investors exceeded losses, any investor who wished to "cash out" could be paid off. The losses, however, were too great to be offset by "roll-overs" or new money, and much of the investors' money has disappeared.

Pet. App. 4a. In addition, the court found that at least some of the investors' money had been transferred to Switzerland. *Ibid.* In light of those findings, the court concluded that the CFTC's evidentiary proffer "sufficiently demonstrated that defendants deceived investors and caused investors to receive false reports" in violation of 7 U.S.C. 6c(b), and that the Commission had alleged facts sufficient to find Dunn personally liable under 7 U.S.C. 13c as an aider and abetter and a controlling person with respect to the violations at issue. Pet. App. 4a-5a.

The court of appeals then addressed the question of whether trading in off-exchange foreign currency options is excluded from the CFTC's jurisdiction by the language of the Treasury Amendment and, in particular, whether the phrase "transactions in foreign currency" contained within that Amendment

includes foreign currency options. Pet App. 5a. The court concluded that the legal question was controlled by its 1986 decision in *ABT*. In that case, the court of appeals had held that the purchase or sale of an option did not constitute a "transaction in foreign currency" until actual exercise of the option occurred, and the defendants' conduct was therefore not subject to the Treasury Amendment's exclusion. *ABT*, 803 F.2d at 1248. The court of appeals acknowledged that the *ABT* panel could have reached the same result through a different rationale by concluding that the instruments at issue in *ABT* were traded on an exchange and were therefore subject to regulation in any event, by virtue of the last clause of the Treasury Amendment. The court declined, however, to adopt that rationale, stating that "a later panel may not disregard the reasoning of a decision because an entirely different line of reasoning was available." Pet. App. 6a.[2]

ARGUMENT

The court of appeals' reasoning in this case is not consistent with that of the Fourth Circuit in *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d 966 (1993), cert. denied, 114 S. Ct. 1540 (1994). That inconsistency, however, does not present a conflict that is ripe for this Court's resolution. The court of appeals' decision in this case is interlocutory, and its review

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[2] The court of appeals was not persuaded by the arguments of various banks, participating as amici curiae, that a number of potentially detrimental effects could result from a holding that off-exchange foreign currency options fall within CEA jurisdiction. The court noted the CFTC's suggestion that those effects were "to a degree deflected" by the CFTC's trade option exemption from the CEA. Pet. App. 7a.

would not resolve the current uncertainty over the scope of the Treasury Amendment and the regulatory authority that might be exercised by the CFTC. The Department of the Treasury and the CFTC have expressed contrary views on the statutory issue involved here, but they have instituted discussions that may lead to a regulatory or legislative resolution of their differences and address various aspects of the current uncertainty. In light of those considerations, review by the Court is not warranted at this time.

1. The Treasury Amendment exempts from CEA regulation "transactions in foreign currency * * * unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. 2(ii). The court of appeals concluded that "the term 'transactions in foreign currency' does not include options, even those options traded off-exchange." Pet. App. 5a. The court relied on its previous decision in *ABT*, which reasoned:

> An option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a "transaction[] in" that currency unless and until the option is exercised.

803 F.2d at 1248.

Petitioners point out (Pet. 8-12) that the court of appeals' construction of the Treasury Amendment is in tension with that of the Fourth Circuit in *Salomon Forex*. That case involved a private suit in which a foreign currency brokerage company, Salomon Forex, sought to enforce a trading debt against a sophisticated foreign currency trader, Dr. Laszlo Tauber. The trader principally argued that the debts were unenforceable because they arose from off-exchange

futures and options transactions that violated the CEA. The district court rejected that defense, holding that the Treasury Amendment exempted those transactions from the CEA. See 795 F. Supp. 768 (E.D. Va. 1992). The court of appeals affirmed. It reasoned that the "broad and unqualified" phrase "transactions in foreign currency" reaches "*all* transactions in which foreign currencies are the subject matter, including options." 8 F.3d at 976.[3]

Although the court of appeals stated that its decision is inconsistent with that of the Fourth Circuit in *Salomon Forex* (Pet. App. 6a), the full scope of the Fourth Circuit's ruling in that case is unclear, see note 3, *supra*, and the decision below does not in any event create a fully ripened conflict warranting this Court's review. The court of appeals' decision in this case arises from the appointment of a temporary receiver in ongoing enforcement proceedings and is therefore interlocutory. See Pet. App. 1a. This Court does not normally grant certiorari to

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[3] The Fourth Circuit did note, however, that the parties before it were sophisticated traders and stated as follows:

> This case does not involve mass marketing to small investors, which would appear to require trading through an exchange, and our holding in no way implies that such marketing is exempt from the CEA. * * * The parties here agree that the transactions between Salomon Forex and Tauber were off-exchange transactions individually negotiated, and it is amply demonstrated that Tauber is a sophisticated investor. We hold only that individually-negotiated foreign currency option and futures transactions between sophisticated, large-scale foreign currency traders fall within the Treasury Amendment's exclusion from CEA coverage.

8 F.3d at 978.

review a non-final decision that may be affected by proceedings on remand. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of certiorari). Review of the court of appeals' interlocutory decision in this case would not likely be a productive use of this Court's resources because, as we explain below, the practical consequences of the decision are open to question.

2. Petitioners state (Pet. 12) that "[t]he lack of uniformity among the circuits places the global foreign currency markets in a state of considerable regulatory uncertainty." But in the end, the Second Circuit in this case simply adhered to its opinion of a decade ago in *ABT*. There also is reason to doubt that the fraudulent conduct alleged in this case—which the court of appeals described as an "old-fashioned Ponzi scheme, accompanied by exotic financial vocabulary" (Pet. App. 4a)—is generally of a sort that legitimate market participants would expect to be altogether immune from legal liability.

Significantly, moreover, the resolution of the issue presented here would not eliminate uncertainty over the regulatory status of off-exchange trading in foreign currency futures and options. Petitioners contend that the Treasury Amendment's reference to "transactions in foreign currency" includes transactions involving both foreign currency futures and options (see Pet. 10), but if the Court were to rule in petitioners' favor on that question, that ruling would

not definitively resolve whether the Treasury Amendment exempts such transactions from CEA regulation. The Treasury Amendment exempts "transactions in foreign currency * * * *unless such transactions involve the sale thereof for future delivery conducted on a board of trade*." 7 U.S.C. 2(ii) (emphasis added). Hence, the question would still arise whether futures and options transactions are subject to CEA regulation based on the Treasury Amendment's "board of trade" proviso.[4]

That issue is itself a source of considerable controversy. One source of uncertainty is the definition of "board of trade." The CEA defines the phrase "board of trade" as

> any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment.

7 U.S.C. 1a(1). The courts have not reached a definitive view on the scope of that definition and, consequently, on the scope of the Treasury Amendment's "board of trade" proviso.[5] That issue may eventually

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[4] See, *e.g.*, C.A. Amicus Br. of Foreign Exchange Committee and the New York Clearing House Ass'n at 13-19 (urging the court of appeals to reverse the district court's judgment and remand the case for a determination of whether the transactions in this case were "conducted on a board of trade").

[5] The Ninth Circuit has suggested that the term "board of trade" may include virtually any "association of persons engaged in the business of selling commodities." See *CFTC* v. *Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 581 (1982); but see *id.* at 584 (Smith, D.J., dissenting) (concluding that the term "board of trade" is limited to an "organized board of trade

warrant this Court's review, but it is not currently before the Court. Accordingly, the Court should not grant the petition for a writ of certiorari in this interlocutory case in the expectation that a decision favoring petitioner would significantly reduce the current uncertainty over the scope of the Treasury Amendment.

3. Petitioners note (Pet. 13-14) that the court of appeals' decision is inconsistent with the position that the United States articulated as amicus curiae in *Salomon Forex*. As the United States explained in that brief, which is reproduced as an appendix to the petition in this case (see Pet. App. 1d-25d), the Treasury Department has a continuing interest in the proper interpretation of the Treasury Amendment by virtue of its issuance of Treasury securities, its role in regulating government security brokers and dealers, and its interest in the foreign currency markets. *Id.* at 8d-11d. The United States filed that brief to express the Treasury Department's interpretation of the Treasury Amendment, which differs in significant respects from the position that the CFTC

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* * * such as the Chicago Board of Trade"). The Fourth Circuit's decision in *Salomon Forex* did not squarely decide that issue, but the court stated that it "would be inclined to reject" the position that the transactions in that case were conducted on a "board of trade." See 8 F.3d at 973 n.5; see also *id.* at 978. A district court has recently relied on the Fourth Circuit's *Salomon Forex* decision in construing the term "board of trade" to reach only organized exchanges, and the CFTC's appeal of that ruling is now pending before the Ninth Circuit. See *CFTC* v. *Frankwell Bullion Ltd.*, 904 F. Supp. 1072, 1075-1076 (N.D. Cal. 1995), appeal docketed, Nos. 95-16977 and 95-17298 (9th Cir.).

(which has independent litigating authority in the lower courts) put forward below.

The court of appeals' decision does not embrace the views expressed by the United States in *Salomon Forex*, and there is currently a disagreement between the Treasury Department and the CFTC over the proper interpretation of the Treasury Amendment. The Treasury Department, the CFTC, and other interested federal agencies recognize the need for discussions regarding their views on the Treasury Amendment and the possibility of further invocation by the CFTC of its authority to exempt certain matters from regulation. See 7 U.S.C. 6(c); 17 C.F.R. 32.4 and 35.2. Those discussions have begun. It is not unrealistic to anticipate that they may lead to regulatory or legislative proposals that will eliminate or narrow the source of the agencies' disagreement and will address concerns about uncertainty in foreign currency markets regarding the scope of regulatory authority that would be exercised by the CFTC.[6] In the event that those efforts do not prove fruitful, this Court will have other opportunities to review the issue presented here, either on writ of certiorari from a final judgment in this case, or on writ of certiorari from a final judgment in another case that also presents the "board of trade" issue. Accordingly, we suggest that this case does not warrant review by the Court at this time.

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[6] For example, the CFTC and the SEC previously disagreed over their respective regulatory authority concerning options on government securities. The CFTC and the SEC reached an accord and jointly sponsored legislation (Act of Oct. 13, 1982, Pub. L. No. 97-303, 96 Stat. 1409) that mooted ongoing litigation. See *Board of Trade* v. *SEC*, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

No. 95-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

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Respondent,

—v.—

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

I. The Second And Fourth Circuits Are Directly In Conflict

The Solicitor General concedes that the Second Circuit's decision below is in conflict with the Fourth Circuit's decision in *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994). *See* Br. in Opp. at 7 (decisions are "not consistent"); *id.* at 8 (decisions are "in tension"). This concession is compelled by the Second Circuit's candid acknowledgment that:

> [O]ur interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* conflicts with that of the Fourth Circuit in *Salomon Forex, Inc. v. Tauber* . . . . This conflict is for the Supreme Court, not us, to resolve.

Pet. App. 6a.

Nevertheless, the Solicitor General attempts to minimize the conflict by arguing that *Salomon Forex* is "unclear" as to whether the foreign currency transactions at issue in that case were conducted on an exchange. *See* Br. in Opp. at 9 & n.3. However, there is nothing unclear about *Salomon Forex*. The parties agreed in that case that the pertinent futures and options contracts were traded *off*-exchange, and the Court so found. 8 F.3d at 978. Similarly, in the present case, the CFTC alleged that petitioners engaged in *off*-exchange trading, *see* Pet. App. 2a, and the Solicitor General concedes that petitioners traded options "outside of an organized exchange." Br. in Opp. at (I) (Question Presented); *id.* at 3. Thus, both the Second Circuit's decision below and *Salomon Forex* construed the Treasury Amendment in the context of *off*-exchange trading, yet they reached contrary results. A direct conflict plainly exists.

II. The Circuit Conflict Should Be Resolved Now

A. The Issue Is Ripe For Review

Contrary to the Solicitor General's argument, the interlocutory posture of this case is no reason for this Court to deny or to defer review. *See* Br. in Opp. at 9-10. This is not a case in which the issue presented will be affected by proceedings on remand. Instead, this case concerns whether the Commodity Exchange Act ("CEA") establishes jurisdiction over *off*-exchange foreign currency options transactions, a threshold issue that will not be further illuminated by the development of facts below. Any further proceedings on remand will address liability issues, but will not narrow, eliminate or otherwise affect the threshold jurisdictional issue, which is purely a question of law. Thus, this case is clearly distinguishable from the cases cited by the Solicitor General in which the court of appeals remanded to the district court for the development of facts that were central to the issue for which review was sought. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J. concurring in the denial of certiorari); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967).

Indeed, this Court frequently has granted review of important issues of law, notwithstanding the interlocutory status of the case. *E.g.*, *California v. American Stores Co.*, 495 U.S. 271, 277-78 (1990); *Buffalo Forge Co. v. United Steelworkers of America AFL-CIO*, 428 U.S. 397, 403-04 (1976); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (Seventh Ed., 1993) pp. 196-97. Interlocutory review is particularly appropriate when the issue presented concerns an important jurisdictional question. For example, in *Larson*, the Court granted certiorari to review an interlocutory "jurisdictional issue [that] was 'fundamental to the further conduct of the case.' " 337 U.S. at 685 n.3 (quoting *Land*, 330 U.S. at 734). Similarly, in this case, the important question of whether the CEA creates jurisdiction over *off*-exchange foreign currency options trading may be dispositive of the entire case, and should be resolved before petitioners are required to defend the case on the merits.[1]

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[1] This Court unquestionably has appellate jurisdiction in this case pursuant to 28 U.S.C. § 1292(a)(2), which provides for interlocutory appeals from orders appointing receivers. Such orders, although not final, may have profound effects on litigants' rights. Thus, "the damage of error unreviewed

The Solicitor General further argues that this case is not ripe for review because it does not present the issue of the scope of the "board of trade" proviso to the Treasury Amendment. *See* Br. in Opp. 10-12. However, the existence of another issue that may eventually merit this Court's review—the meaning of the "board of trade" proviso—is not a reason to deny review of the issue presented here, particularly since the great majority of foreign currency options transactions are conducted *off* organized exchanges. *See* Brief for Amici Curiae Credit Lyonnais, Bank Julius Baer & Co., Ltd., The Chase Manhattan Bank, N.A. and Societe Generale in Support of Petition for a Writ of Certiorari ("Br. for Amici Banks") at 2 (citing "Central Bank Survey of Foreign Exchange Market Activity," Bank for International Settlements (March 1993 at p. 22)). With respect to these *off*-exchange foreign currency options, the only issue under the Treasury Amendment is whether they are "transactions in foreign currency," the issue presented here. Resolution of this important question will help achieve uniform interpretation of federal law with respect to most foreign currency options transactions regardless of whether this Court also decides the "board of trade" question. Thus, there is no reason to wait for a case that presents both issues, as the Solicitor General suggests. *See* Br. in Opp. at 13.[2]

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before the judgment is definitive and complete . . . has been deemed greater than the disruption caused by intermediate appeal." *DiBella v. United States*, 369 U.S. 121, 124 (1962).

[2] The Solicitor General also argues that review is unnecessary because of the nature of the fraudulent conduct alleged in the CFTC's complaint. Br. in Opp. at 10. Of course, the complaint merely contains allegations—nothing has yet been proved. It would be unjust to deny petitioners review of the scope of the Treasury Amendment on the basis of allegations that the CFTC may not have jurisdiction to make.

B. The Conflict Will Have Significant Adverse Effects On The Foreign Currency Market

The circuit conflict stemming from the decision below creates substantial uncertainty concerning the regulation of a large and important sector of the foreign currency market. This uncertainty is likely to have significant detrimental effects on the governments, businesses and individuals who rely on the market for billions of dollars worth of transactions each day. Among other things, the lack of a consistent regulatory framework in the United States threatens to disrupt the smooth functioning of the global market; to impair the ability of traders in the United States to compete with foreign institutions that operate in jurisdictions where the law is clear; and to chill the development of innovative financial products. *See* Brief for the United States as Amicus Curiae in *Salomon Forex, Inc. v. Tauber*, Pet. App. 10d; Br. for Amici Banks at 6-10.

The Solicitor General argues that the market has tolerated this conflict since the Second Circuit's decision in *Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986). *See* Br. in Opp. at 10. To the contrary, no conflict existed until the Second Circuit's decision below. The *American Board of Trade* case involved trading *on* an exchange. *See* Pet. App. 6a. The Second Circuit's decision in that case was understood to apply only to such *on*-exchange trading and not to implicate the larger sector of the market in which trading occurs *off*-exchange. Thus, in *Salomon Forex*, the Fourth Circuit distinguished *American Board of Trade* on the ground that it "concerned *on-exchange* trading on behalf of the general public." 8 F.3d at 977 (emphasis in original). The Second Circuit's decision below for the first time extended the interpretation of "transactions in foreign currency" in *American Board of Trade* to *off*-exchange foreign currency options. Only when the *American Board of Trade* analysis could no longer be limited to

exchange-traded options did an irreconcilable conflict with the Fourth Circuit develop.

Nor are the adverse effects of the circuit conflict in any way "deflected" by the so-called "trade option exemption" to the CEA. Br. in Opp. 7 n.2; Pet. App. 7a. That exemption is a "limited exemption," Pet. App. 7a, which applies only to commodity options offered by a person who:

> has reasonable basis to believe that the option is offered to a producer, processor, or commercial user of, or a merchant handling, the commodity . . . and that such producer, processor, commercial user or merchant is offered or enters into the commodity option transaction solely for purposes related to its business as such.

17 C.F.R. § 32.4. The exemption does not, on its face, cover foreign currency options traded among banks and dealers. *See Board of Trade of Chicago v. Securities and Exchange Comm'n*, 677 F.2d 1137, 1144 & n.14 (7th Cir.) (characterizing trade option exemption as a "limited exception[ ] for merchants in the underlying commodity during the course of their business"), *vacated as moot*, 459 U.S. 1026 (1982). Curiously, although the CFTC suggested at oral argument below that the trade option exemption might also apply to options traded among banks, *see* Pet. App. 7a, the Solicitor General's opposition neither explains the scope of the exemption nor takes a position on behalf of the CFTC or the United States. The government's failure to commit to a position on this point only increases the regulatory uncertainty and in no way alleviates the chill upon a robust foreign currency market occasioned by the decision below.

C. Review Is Necessary In View Of The Conflicting Positions Of The CFTC And The United States

The Solicitor General concedes that the CFTC and the Treasury Department disagree on the merits of the question presented in this case. Br. in Opp. at 12-13. While the Treasury

Department agrees with petitioners that the phrase "transactions in foreign currency" exempts *off*-exchange foreign currency options transactions from CFTC jurisdiction, the CFTC (which has independent litigating authority in the lower courts) has asserted the contrary position. *Id.*; *see Salomon Forex*, 8 F.3d at 974 (describing conflicting positions). This stark conflict between the two regulatory bodies most responsible for oversight of the foreign currency markets creates unacceptable confusion among those subject to regulation. Review by this Court is essential to resolve this uncertainty.

The Court should not wait for the CFTC and the Treasury Department to resolve their disagreement on their own. *See* Br. in Opp. at 8, 13. The CFTC and the Treasury Department have taken conflicting positions at least since they filed separate briefs in *Salomon Forex*. *See id.*, 8 F.3d at 974. Since then, they have had almost four years to resolve their differences. Apparently, they have failed to do so. The denial of certiorari in this case certainly will not provide the needed incentive for a consensual resolution, and may even encourage the CFTC to continue to exercise jurisdiction that is excluded by the statute.

Moreover, as a practical matter, this Court's grant of review may compel a resolution of the intra-government conflict. While the CFTC was at liberty to assert a conflicting position below due to its independent litigating authority in the lower courts, the Solicitor General has sole litigating authority on behalf of the CFTC and the United States in this Court. Accordingly, if this Court grants review, the Solicitor General will be required to present a unified position. Assuming that normal approval procedures were followed in *Salomon Forex*, the Solicitor General has already approved the Treasury Department's position on the merits. *See* 28 C.F.R. § 0.20(c) (requiring Solicitor General approval for the government to file an amicus brief). Thus, simply granting review in this case may result in a confession of error by the Solicitor General.

Conclusion

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1996

(3)

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QUESTION PRESENTED

Whether the "Treasury Amendment" (7 U.S.C. § 2(ii)) to the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*)—which provides in pertinent part that "[n]othing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade"—exempts from the jurisdiction of the Commodity Futures Trading Commission *off*-exchange foreign currency options.

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption.*

* Filed herewith are the consents both of petitioners and respondents to the filing of this *amicus* brief.

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STATEMENT OF INTEREST

Amici are all banks with offices or branches in major money-centers, including New York. All are active, world-wide participants in the over-the-counter foreign currency market. This market, which is not an organized exchange, features global, 24 hour trading in which dealers, such as *amici*, and other participants make large transactions in virtually all

currencies. These transactions are all privately negotiated and settled, typically by telephone or computer. The Bank for International Settlements in its "Central Bank Survey of Foreign Exchange Market Activity" reported that "global net turnover in the world's foreign exchange markets is estimated to have been $880 billion per business day in April 1992" (March, 1993 at p. 1).

Amici also deal in currency options. An option provides the right, but not the obligation, to purchase or sell currency in the future. On organized exchanges, currency options are standardized contracts in which a finite number of currencies and option terms are offered. By contrast, the terms of off-exchange options are freely negotiable and are customized by the parties to suit their particular circumstances. One study estimated *daily* volume of off-exchange currency options in April, 1992 to be $31 billion (*Id.* at 22). Volume is widely believed to have increased since that date. Five times more currency options are traded in privately negotiated, over-the-counter transactions than on organized exchanges (*Id.*). This clear preference for trading currency options over the counter is explained by the flexibility of terms, ease of participation and superior liquidity of that market.

The Petition asks the Court to determine whether the Second Circuit Court of Appeals correctly held that the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (the "CEA"), applies to off-exchange trading in currency options. The Second Circuit candidly acknowledged that its decision construing the CEA to have such breadth was in direct conflict with a decision of the Fourth Circuit. Thus, at present, the CEA controls off-exchange foreign currency options trading in New York but not in Baltimore. As active market participants, *amici* have a vital interest in a smoothly functioning currency options market informed by uniform judicial determinations concerning the applicability of the CEA.

Prior to the Second Circuit's decision, it was generally understood that the CEA did not apply to over-the-counter

transactions in currency options, at least between sophisticated institutions. For example, in this case the options trading allegedly occurred between major banks and a $100 million hedge fund. If permitted to stand, the Second Circuit's decision would result in significant costs to market participants such as *amici*,[1] heighten existing uncertainty over the enforceability of billions of dollars of currency options contracts and afford competitive advantages to market participants in other parts of the world who could trade beyond the reach of the CEA.

Amici are also interested parties because they and petitioners William Dunn and Delta Consultants, Inc. ("Dunn/Delta") have been named as defendants in related civil litigation now pending in the United States District Court for the Southern District of New York.[2] That litigation was brought by investors in the hedge fund operated by Dunn/Delta (the "Fund"). The Fund allegedly traded foreign currency options with, among others, *amici*. The plaintiff investors have alleged that *amici* violated the anti-fraud provisions of the CEA.

Amici Crédit Lyonnais and Bank Julius Baer have moved to dismiss the investors' CEA claims on the ground, among others, that the CEA does not apply to the foreign exchange trading activities alleged in the investor complaints. As the

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[1] Those costs include incurring the expense of registration and compliance that attend CFTC regulation, meeting capital requirements imposed by the CEA, being forced to trade on a CFTC designated exchange and exposure to private rights of action under the CEA.

[2] *Amici* were all originally named as defendants in *Sundial International Fund Ltd., et al.* v. *Delta Consultants, Inc., et al.*, 94 Civ. 118 (TPG). Subsequently, claims against *amicus* The Chase Manhattan Bank, N.A. were dismissed without prejudice. *Amici* Crédit Lyonnais and Bank Julius Baer are also defendants in companion suits entitled *Musashi Limited* v. *Delta Consultants, Inc., et al.*, 95 Civ. 3773 (TPG) and *Mablyn Investments Limited* v. *Delta Consultants, Inc., et al.*, 95 Civ. 3774 (TPG).

Petition raises that very issue, *amici* are keenly interested in its disposition.

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the CEA, Section 2(a)(1)(A)(ii), codified at 7 U.S.C. § 2(ii), provides as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the Petition except as to one matter. Petitioners have framed the question and characterized the decisions below as construing the extent of the CFTC's jurisdiction under the Treasury Amendment. The Treasury Amendment does not specifically speak to the CFTC's jurisdiction, but rather more broadly, to whether the CEA as a whole "shall be deemed to govern or in any way be applicable to transactions in foreign currency." The distinction is significant because, in addition to authorizing the CFTC to bring enforcement proceedings, the CEA provides private rights of action.[3]

In determining whether to grant the CFTC's motion to have a receiver appointed, the District Court appropriately considered its own subject matter jurisdiction under the CEA rather than the CFTC's ability to make such a motion (*See* decision reprinted at Appendix p. 6a of the Petition).

[3] *See* Section 22 of the CEA, 7 U.S.C. § 25.

Although the Court of Appeals opinion framed the issue in terms of the CFTC's jurisdiction, the more precise question is whether off-exchange foreign currency options are within the general subject matter jurisdiction of the CEA.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Has Obviously Misread an Important Provision of the CEA.

The Treasury Amendment excludes from the Act's coverage, *inter alia*, all "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." On its face, this language has a broad reach, excluding all off-exchange commerce in foreign currency. But in its decision below, the Court of Appeals read the Treasury Amendment very narrowly. Without elaboration, it simply adhered to its earlier opinion in *Commodity Futures Trading Comm'n* v. *American Board of Trade*, 803 F.2d 1242, (2d Cir. 1986), which briefly concluded (in a case involving exchange traded options) that the words "transactions in foreign currency" do not encompass foreign currency options: "An option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a 'transaction [ ] in' that currency unless and until the option is exercised." (*Id.* at 1248).

The Second Circuit's interpretation is dramatically inconsistent with the everyday meaning of the words "transaction in foreign currency" and the broad meaning given to "transaction" by the CEA itself. This broad meaning is exemplified in the CEA's jurisdictional section, the subparagraph immediately preceding the Treasury Amendment, which catalogues the commercial activities falling within the CEA.[4] The word

[4] Sec. 2.(a)(1)(A)(i) of the CEA, 7 U.S.C. § 2, states in pertinent part:

> The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraph (B) of this paragraph,

"transaction" is used in that listing three times. Of relevance here is its first appearance, to help define the word "agreement" to include "any transaction which is of the character of, or is commonly known to the trade as, an 'option'. . ." Plainly, as used in the CEA, an "option" is encompassed within the meaning of "transaction." And, a "currency option" is encompassed by the Treasury Amendment's reference to "transactions in foreign currency."

B. Unless Clarified by the Court, Contradictory Interpretations of the Treasury Amendment Will Adversely Affect the Market.

In the opinion below, the Second Circuit intimated that it may have had "doubts. . .about the interpretation given the Treasury Amendment in *American Board of Trade*," but believed itself constrained to follow its own precedent. Unfortunately, that inhibition, coupled with the Fourth Circuit's contrary opinion and diverging views of other courts, the CFTC and the United States Treasury, leaves market participants badly confused.[5]

with respect to accounts, agreements (*including any transaction which is of the character of, or is commonly known to the trade as, an "option"*, "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for a future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 19 of this Act. (Emphasis added).

[5] If, as the Second Circuit held, off-exchange currency options are governed by the CEA, they are illegal and unenforceable if not traded in compliance with the CEA. Although the so-called "swaps exemption" issued by the CFTC (17 C.F.R. § 35) provides some safety from this enormous legal risk, it only applies to certain types of transactions between "eligible swap participants." As noted in United States General Accounting Office Report to Congressional Requesters, *Financial Derivatives: Actions Needed to Protect the Financial System* (May 1994) ("GAO Derivatives Report") the swaps exemption "does not completely eliminate the risk that a swaps contract could be found to violate CEA." (*Id.* at 65).

The Second Circuit's reading is particularly untenable from a practical, commercial perspective because it makes CEA jurisdiction dependent on whether a currency option is exercised. Neither an option purchaser nor seller can know at the time of purchase or sale whether the option will be exercised. That is purely a function of the price movements of the underlying currency and the discretion of the option holder.[6] To decide, in the words of the Second Circuit, that the CEA governs an off-exchange currency option "unless and until the option is exercised" is to make application of the CEA solely a function of (1) the market forces which determine whether the option has any value and (2) the financial judgment of the option holder. This shifting jurisdictional definition cannot provide the predictability necessary for a smoothly functioning market and cannot be what the Treasury Amendment means.

Of additional concern to all market participants interested in uniformity, the Second Circuit acknowledged that its "interpretation of the phrase 'transactions in foreign currency' . . . conflicts with that of the Fourth Circuit in *Salomon Forex* v. *Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540, *reh'g denied*, 114 S. Ct. 2156 (1994)." The Sec-

[6] The GAO Derivatives Report (at p. 27) characterizes "options" as one type of derivative and discusses them as follows:

> Option contracts, which can be either customized and privately negotiated or standardized, give the purchaser the right to buy (call option) or sell (put option) a specified quantity of a commodity or financial asset at a particular price (the exercise price) on or before a certain future date. . .
>
> Options differ from forwards and futures in that options do not require the purchaser to buy or sell the underlying. A purchaser will not exercise an option until the market price of the underlying is greater than the exercise price for a call option or less than the exercise price for a put option. Options that are not exercised expire with no value.

ond Circuit suggested that "[t]his conflict is for the Supreme Court, not us, to resolve." Unlike the Second Circuit, the Fourth Circuit, in six pages of analysis, had found the phrase "transactions in foreign currency" "broad and unqualified:"[7]

> *[T]he Treasury Amendment applies to all transactions in which foreign currencies are the subject matter, including options.* Since trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them. . . ."

Id. at 976 (emphasis added).

In *Salomon Forex*, a sophisticated, large scale foreign currency trader tried to avoid a $25 million loss from off-exchange transactions in currency forwards and options. The trader argued that because the CEA requires foreign currency futures to be traded exclusively on exchanges designated by the CFTC and options to be traded on CFTC or SEC designated exchanges, the off-exchange transactions in which he engaged were illegal and voidable. *Id.* at 973.

Having the benefit of *amicus* participation by, among others, the CFTC, the United States Treasury, the Foreign Exchange Committee, the Futures Industry Association and the Managed Futures Association (a trade group of major money center banks), all of whom argued against application of the CEA to the transactions at issue, the Fourth Circuit rejected the trader's claim. The Fourth Circuit found the contracts beyond the reach of the CEA and lawful.

Even apart from conflicting with *Salomon Forex*, the Second Circuit's jurisdictional boundary compounds an already-bewildering set of Treasury Amendment interpretations.[8] For

[7] *Id.* at 975.

[8] The Second Circuit's decision has not resolved the interpretation of the Treasury Amendment. After the Second Circuit's decision, the Fourth Circuit's *Salomon Forex* decision was followed in *Commodity Futures Trading Comm'n* v. *Frankwell Bullion Ltd.*, 904 F. Supp. 1072 (N.D. Cal. 1995) (off-exchange foreign currency transactions, regardless of whether they are "futures" or "spot trades," fall outside CEA jurisdiction).

example, some views of when the Treasury Amendment is to apply are based on whether the parties to off-exchange currency transactions are "sophisticated." The CFTC has itself stated that the Treasury Amendment excludes from the CEA currency transactions "among and between banks and other sophisticated, informed institutions." *Statutory Interpretation Regarding Trading in Foreign Currencies for Future Delivery*, 50 Fed. Reg. 42983 (1985). But courts are in conflict as to whether traders' "sophistication" should influence the scope of CEA jurisdiction over currency transactions. *Compare Commodity Futures Trading Comm'n* v. *Standard Forex, Inc.*, [1994 Current] Comm. Fut. L. Rep. (CCH) ¶26,063 (E.D.N.Y. Aug. 9, 1993) (holding that the Treasury Amendment did not exclude from CEA jurisdiction spot foreign currency contracts between an exchange and private, unsophisticated investors) with *Salomon Forex*, 8 F.3d at 978 ("We hold only that individually-negotiated foreign currency option and futures transactions *between sophisticated, large-scale foreign currency traders* fall within the Treasury Amendment's exclusion from CEA coverage" (emphasis added)); and *Frankwell Bullion*, 904 F. Supp. at 1076-77 (rejecting any difference in treatment of sophisticated or unsophisticated parties because "[t]he Treasury Amendment makes no distinction based on the identity or character of the participants" and because "a distinction between sophisticated large-scale investors and private unsophisticated investors would be arbitrary and nearly impossible to apply").

As is clear from the *amicus* brief of the United States in *Salomon Forex* (Appendix D to the Petition), the Department of the Treasury and the Securities Exchange Commission construe the Treasury Amendment to exclude a much broader class of currency transactions, including options, than does the CFTC. As a result, "whether structured as a future contract or an option" the United States supported the lower

court's holding in *Salomon Forex* that "[a]ll transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA" (*Id.* at p. 16d).

Plainly, *amici* and other market participants not only face court decisions which are in direct conflict but also a divided national regulatory authority. This confusion adversely affects an important global market in which the United States Government and American commercial interests are major participants. Clarification by this Court is urgently needed.

C. The Court of Appeals' Decision Conflicts with Applicable Decisions of this Court.

This Court has been a determined exponent of giving statutes their "plain meaning." Although the Court has not previously construed the Treasury Amendment, the Court of Appeals decision is a dramatic departure from the principles of statutory construction which the Court has mandated. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Accord, Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1453-54 ("Policy considerations cannot override our interpretation of the text and structure of the [Securities] Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it").

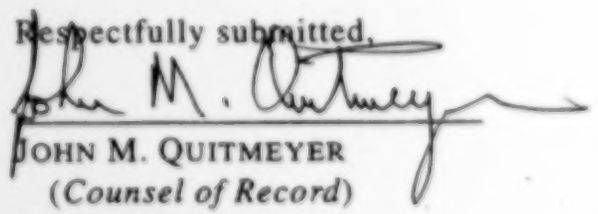
As discussed above, the Court of Appeals construction of the phrase "transactions in foreign currency" is not only tortured but also creates a continuously moving jurisdictional boundary. It plainly disregards the usual starting "assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369

U.S. 1, 9 (1961). And, as demonstrated, the Second Circuit's determination that the word "transaction" does not comprehend an "option" conflicts with the meaning given to "transaction" in an adjoining provision of the CEA. The Court of Appeals thereby violated "the normal rule of statutory construction [which] assumes that 'identical words used in different parts of the same act are intended to have the same meaning.' " *Sorenson* v. *Sect'y of Treasury*, 475, U.S. 851, 860 (1986), *quoting*, *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). For this reason, as well, the Petition should be granted.

CONCLUSION

Off-exchange foreign currency options are presently traded in huge volumes in the United States and around the world. There is no more fundamental issue for participants in this market than whether the Commodity Exchange Act governs such foreign currency transactions. Two courts of appeals, one of which sits in a world financial capital, have reached opposite conclusions. Only action by this Court will resolve this important question. The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: April 22, 1996

(4)

No. 95-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,
Petitioners,

– v. –

COMMODITY FUTURES TRADING COMMISSION,
Respondent,

– v. –

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE FOREIGN EXCHANGE COMMITTEE, THE NEW YORK CLEARING HOUSE ASSOCIATION, THE FUTURES INDUSTRY ASSOCIATION, THE MANAGED FUTURES ASSOCIATION AND THE PUBLIC SECURITIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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April 24, 1996

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The Foreign Exchange Committee (the "FX Committee"), The New York Clearing House Association (the "Clearing House"), the Futures Industry Association ("FIA"), the Managed Futures Association ("MFA") and the

Public Securities Association ("PSA") (collectively, the "Industry Associations") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 23, 1995, which affirmed the order of the district court for the Southern District of New York appointing a temporary receiver.[1/]

Interests of *Amici Curiae*

The Industry Associations represent many of the most significant participants in foreign exchange forwards and options trading in the United States.

Formed in 1978 under the sponsorship of the Federal Reserve Bank of New York, the FX Committee includes representatives of major domestic and foreign commercial and investment banks and foreign exchange brokers and dealers.[2/] The Clearing House is an unincorporated

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1/ In accordance with Supreme Court Rule 37, the Industry Associations have received written consent of all parties to file this brief. Original copies of these consents have been filed with the Clerk of Court.

2/ The members of the FX Committee are AIG Trading Group, Bank of America, The Bank of Boston, Bank of Montreal, The Bank of New York, The Bank of Tokyo, Ltd., Bankers Trust, The Chase Manhattan Bank, N.A., Chemical Bank, CIBC—Wood Gundy, Citibank, N.A., Deutsche Bank, First Banks N.A., First National Bank of Chicago, Goldman, Sachs & Co., Lasser Marshall, Manufacturers & Traders Bank, Merrill Lynch & Co., Inc., Marine Midland Bank, Morgan Guaranty Trust Company of New York, Morgan Stanley & Co. Incorporated, NationsBanc—CRT, Republic National Bank of New York, Royal Bank of Canada, Swiss

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association of eleven leading commercial banks in the City of New York,[3/] a majority of which are active in foreign exchange trading.

The MFA is a not-for-profit association representing the managed futures industry, including leading United States and international managers, foreign exchange dealers, banks, commodity pool operators ("CPOs"), commodity trading advisors ("CTAs"), futures brokerage firms, exchanges and service providers involved in professional asset management.

The FIA is a national trade association representing the futures industry. Its members include approximately ninety of the largest futures brokerage firms, or FCMs, which effect more than eighty percent of the transactions conducted on United States futures exchanges, as well as users of the futures markets such as commercial and investment banks, CPOs, CTAs, and pension, insurance and mutual fund managers. Its members are also active in over-the-counter ("OTC") foreign exchange trading.

The PSA is the bond market trade association, representing approximately 275 securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. PSA's members include all

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2/(...continued)
Bank Corporation and Tullett & Tokyo Forex International Limited.

3/ The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank N.A., European American Bank and Republic National Bank of New York.

of the primary dealers in government securities recognized by the Federal Reserve Bank of New York, as well as other government securities dealers. PSA actively represents its members in connection with all aspects of legislative and regulatory matters affecting or potentially affecting the government securities market, including the market for United States Treasury securities, and mortgage-backed and non-mortgage-backed securities issued by United States government agencies and government sponsored enterprises.

Certain members of the Industry Associations have been trading foreign exchange on the OTC foreign currency forwards and options markets with each other and sophisticated counterparties in the United States and around the world for years, with the understanding that their activities were excluded from regulation by the Commodity Futures Trade Commission (the "CFTC") under the Commodity Exchange Act ("CEA").[4/]

[4/] The OTC markets are separate and distinct from commodity exchanges designated by the CFTC for foreign exchange futures and options trading. In the OTC markets, foreign currency transactions are bilateral agreements subject to individual negotiation and customization, in contrast to the contracts that are traded on designated exchanges in which the only variables are the price and timing of the trade.

Options are agreements conveying the right, but not the obligation, to buy or sell a specified amount of currency at a specified exchange rate. Forwards are agreements to exchange two currencies at a specified exchange rate on a future date. By using the term "forward," *amici* do not intend to conclude that the transactions at issue are forwards rather than futures. Because the term "forward" is used in the OTC market and in data sources concerning the market, it is used here rather

(continued...)

The holding of the Court of Appeals for the Second Circuit—that OTC foreign exchange options are subject to the CEA—could impose tremendous regulatory and transactional costs on the OTC foreign exchange markets, create significant uncertainty over the enforceability of contracts and possibly drive these markets out of the United States, while also disadvantaging market participants in this country in global competition. Indeed, many large-scale participants in foreign currency transactions, which historically have centered their business activities in the United States, could in response shift their foreign exchange trading to their overseas offices to the detriment of the United States markets.

While the appeal below involved a dispute relating to foreign exchange transactions, PSA and its members nonetheless have a vital interest in the disposition of this case because of its potential impact on the government securities markets (because of the Treasury Amendment's exclusion for "transactions in . . . government securities").

Accordingly, it is of vital interest to the members of the Industry Associations that a writ of certiorari issue to review the judgment of the Court of Appeals.

Background

1. The Foreign Exchange Markets

The OTC foreign exchange forward and option markets are highly evolved, sophisticated and very active. Trading is

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[4/](...continued)
than the term "futures." Forwards are excluded from CEA coverage. *See* 7 U.S.C. § 2.

conducted twenty-four hours a day, from 6:00 a.m. Sydney, Australia time on Monday until 5:00 p.m. New York time on Friday, with exchange-rate quotations available worldwide on computer screens and personal telephone pagers. These OTC transactions are not conducted on organized exchanges. Most trading is conducted over the telephone directly with dealers or through brokers. These markets are sensitive to political and financial developments around the world and around the clock.

In addition to commercial and investment banks, the most significant participants in the OTC currency markets are foreign exchange dealers and brokerage companies, corporations, money managers (including pension, mutual fund and commodity pool managers), commodity trading advisors, insurance companies, governments, and central banks. Indeed, governments and businesses have historically relied upon the OTC currency markets to serve a number of their fiscal and commercial needs.

For example, the Federal Reserve Bank of New York (on behalf of the United States and foreign central banks), foreign central banks and foreign governments intervene in the OTC currency markets in an effort to implement their policies with respect to their national currencies.

The importance of foreign exchange to the United States economy is considerable. United States businesses as well as financial institutions depend on active trading in, and the orderly function of, the foreign exchange markets. These OTC markets provide businesses with access to international markets for goods and services by providing the foreign currency necessary for transactions worldwide.

These liquid markets also assist international businesses faced with the vagaries of global interest rate and currency volatility by providing a means of hedging against the risk of an adverse exchange-rate movement. OTC foreign exchange

forward and option contracts are commonly used to hedge inventories or accounts receivable or payable denominated in a particular currency. Such contracts allow participants to shift the risk of adverse exchange-rate movements to a counterparty willing to accept that risk.

The global significance of these markets and the full scope of activity in this country is evident from a triennial survey conducted by the Bank for International Settlements ("BIS") in Basle, Switzerland based on a survey of data submitted by the central banks in twenty-six countries, including the United States Federal Reserve Bank. According to the BIS, in April 1995 the average daily turnover in foreign currency forward transactions in twenty-six countries was approximately $100 billion, representing approximately a 70% increase over the prior three-year period.[5/] Average daily turnover of OTC currency options was $40 billion in April 1995, representing a 29% increase over the prior three-year period.[6/] Approximately one-half ($20 billion) of daily turnover of OTC currency options is attributable to the United States.[7/] In addition, 80% of all options transactions

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5/ BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1995: Preliminary Global Findings" at 2, Table 1 (Oct. 24, 1995); *cf.* BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1992" at 19, Table 1-A (March 1993).

6/ BIS, "Central Bank Survey of Derivatives Market Activity: Release of Preliminary Global Totals" at 4 (Dec. 18, 1995).

7/ Federal Reserve Bank of New York, "Central Bank Survey of Derivative Markets Activity Results of the Survey in the United States," at Annex II, Table 5-U.S. (Dec. 18, 1995).

involve United States dollars as one of the exchanged currencies in both the United States and global totals.[8/]

The "great bulk" of options in foreign currency are traded in OTC markets, while exchange-traded foreign currency options constitute a "small part" of the total.[9/] Collectively, the United States, United Kingdom and Japan account for more than half (fifty-six percent) of the global daily turnover in foreign exchange.[10/] The United States and the United Kingdom rank top in the world, with sixteen and thirty percent, respectively, of the global daily turnover in foreign exchange.

2. The Treasury Amendment

In 1974, Congress greatly expanded the scope of commodities covered by the CEA. As a result of the proposed expanded scope of the CEA and its potential impact on existing foreign exchange and other financial markets, and out of a concern that the CEA's "new regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors," the Treasury Department requested Congress to enact the so-called Treasury Amendment. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888 (herein "*Legislative History*"). The Treasury Amendment, which

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8/ *Id.* at 9.

9/ *See* BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1992" at 22.

10/ BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1995: Preliminary Global Findings" at Table 3.

excludes from CEA coverage foreign exchange transactions, provides in pertinent part:

> Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery on a board of trade.

7 U.S.C. § 2(a)(1)(A)(ii).

3. The Conflicting Interpretations of the Treasury Amendment in the Second and Fourth Circuits

Construing the Treasury Amendment in a 1986 decision involving the systematic retail marketing of options to unsophisticated parties, the Second Circuit opined that "[a]n option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a 'transaction[] in' that currency unless and until the option is exercised." *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986) (citations omitted). The Court then determined that the "Treasury Amendment did not, on its face, appear to exclude defendants' foreign currency options business from regulation," *id.*, and further found that the legislative history of the Treasury Amendment "belie[d] the notion that the exception was designed to exclude from regulation foreign currency options transactions *such as those defendants engaged in with private individuals*," *id.* at 1249 (emphasis added).

The Second Circuit's decision in *American Board of Trade* that the Treasury Amendment does not apply to options appeared to be limited to the facts of the case: the defendants were a self-proclaimed board of trade (the so-called "American Board of Trade") that "provided, *inter alia*, an exchange and marketplace for certain commodity options transactions." *Id.* at 1244, 1248-49. Accordingly, members of the Industry Associations had reason to believe that their

activities, which do not involve the systematic retail marketing of standardized contracts to the public, remained excluded from the CEA and CFTC jurisdiction. Indeed, this belief was affirmed in the Fourth Circuit's later interpretation of the Treasury Amendment.[11/]

In *Salomon Forex, Inc.* v. *Tauber*, the Fourth Circuit held that the plain language and legislative history of the Treasury Amendment excludes from CEA coverage "individually-negotiated foreign currency option and futures transactions between sophisticated, large-scale foreign currency traders." 8 F.3d 966, 978 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994) (no CFTC jurisdiction over options trading by a sophisticated individual).

Analyzing the language of the Treasury Amendment, the Fourth Circuit stated:

> The class of transactions covered by the general clause "transactions in foreign currency" must include a larger class than those removed from it by the "unless" clause in order to give the latter clause meaning. Thus, because the clause "unless such transactions involve the sale thereof for future delivery conducted on a board of trade" refers to futures, the general clause "transactions in foreign currency" must also include futures. Under this analysis, we would have to construe the Treasury Amendment exempting transactions in foreign

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11/ The only other Court of Appeals to confront the issue of the meaning of the Treasury Amendment declined to determine "whether the Treasury Amendment affects any CFTC jurisdiction over options on foreign currency." *Board of Trade of the City of Chicago* v. *SEC*, 677 F.2d 1137, 1154 n.34 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982).

> currency to reach beyond transactions in the commodity itself and to include *all* transactions in which foreign currency is the subject matter, including futures and options.

Id., 8 F.3d at 975 (emphasis original).

The Fourth Circuit further opined that "it is a short step to conclude that the Treasury Amendment applies to *all* transactions in which foreign currencies are the subject matter, including options." *Id.* at 976 (emphasis original). The Court reasoned that "[s]ince trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context." *Id.* The Fourth Circuit also found that application of the Treasury Amendment to options transactions in foreign currency was consistent with its legislative history. *Id.* at 976.

The Fourth Circuit reconciled its holding with *American Board of Trade* by distinguishing the nature of the parties and the circumstances of the transactions involved in the two cases and referring to the Second Circuit's analysis of the "transactions in foreign currency" clause of the Treasury Amendment as "dictum":

> Although the [Second Circuit], in dictum, seemed to indicate that no trading in foreign currency options or futures is excluded from CEA coverage because such trading is not trading "in" foreign currencies, at the same time it noted that such trading *is* excluded when carried out by sophisticated financial institutions. This inconsistency reveals that the key for the Second Circuit in deciding the case was not the subject matter of the deals—but the identity of the parties—unsophisticated private individuals buying on an organized exchange.

Id. at 977-78 (emphasis original).

Notwithstanding the beliefs of the Fourth Circuit (which were consistent with the views of the Industry Associations), the Second Circuit has now eliminated all doubt that the Treasury Amendment does not include off-exchange options transactions in foreign currency, regardless of the identity and sophistication of the parties and the circumstances in which the transactions are conducted. *CFTC* v. *Dunn*, 58 F.3d 50, 53 (2d Cir. 1995) (citing *American Board of Trade* and stating that "[t]his issue is foreclosed by clear precedent in this circuit"). Although the Second Circuit recognized that the panel in *American Board of Trade* could have determined that the transactions at issue were regulated by the CFTC because they occurred on a "board of trade," it professed to be unable to alter in retrospect its prior holding that options are not "transactions in foreign currency." *Id.* ("Appellants and *amici* are correct that we could have altered our reasoning and reached the same result by stating that because the instruments at issue in *American Board of Trade* were traded on an exchange they fell outside the Treasury Amendment. Nevertheless that was not the path we chose.").

The Second Circuit acknowledged the conflict between its decision and that of the Fourth Circuit in *Salomon Forex, Inc.* v. *Tauber*, as well as the "potentially dire effects" of its holding (citing the *amicus* brief submitted by the Industry Associations), but reiterated that it was "bound by precedent." *Id.* at 54. Doubting its prior holding but regarding itself as powerless to alter it, the Second Circuit expressed a need for certiorari review to resolve the conflict between its holding and that of the Fourth Circuit:

> Whatever doubts this panel may have about the interpretation given the Treasury Amendment in *American Board of Trade* . . . are not grounds for our declining to follow it. We acknowledge that our interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* conflicts with that of the Fourth Circuit in *Salomon Forex, Inc.* v. *Tauber* . . . . This conflict is for the Supreme Court, not us to decide.

Id.

REASONS FOR GRANTING THE PETITION

The Second Circuit's holding—that foreign currency options transactions are not within the Treasury Amendment's exclusion and, therefore, fall within the CEA and CFTC jurisdiction—is contrary to the plain language and legislative history of the Treasury Amendment. Such a narrow interpretation of the Treasury Amendment imposes tremendous regulatory and transactional costs on the OTC foreign exchange markets, creates significant uncertainty over the enforceability of the United States' half of the $40 billion dollars in foreign currency options transactions traded daily, and will possibly drive these markets out of the United States while also disadvantaging participants in this country in global competition. For their transactions to be enforceable, parties engaging in OTC foreign currency options transactions in the Second Circuit now must qualify for a regulatory exemption *in lieu* of the broad statutory exclusion from the CEA and CFTC jurisdiction intended by Congress in enacting the Treasury Amendment.

The Second Circuit's decision is thus contrary to the purpose of the Treasury Amendment, which was enacted in response to a concern that the 1974 amendments to the CEA would have "an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." *Legislative History* at 5888.

In addition, the Second Circuit's decision squarely conflicts with that of the Fourth Circuit. Lack of uniformity

in the Circuits on the enforceability of foreign currency option contracts creates the opportunity for enterprising plaintiffs to forum shop in an attempt to invalidate their unprofitable options transactions.

I.

The Second Circuit's holding that options transactions in foreign currency are somehow not "transactions in foreign currency" is contrary to the plain meaning of the Treasury Amendment. As the Fourth Circuit's analysis of the language of the Treasury Amendment demonstrates, the "transactions in foreign currency" clause must include options transactions for the "unless" clause to be reconcilable with the whole provision. *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d at 975.

In contrast, the Second Circuit's holding in *American Board of Trade* is based on the semantic distinction between transactions "in" and transactions "involving" foreign currency, which was not even necessary for the Court to address. *See CFTC* v. *Dunn*, 58 F.3d at 53 ("we could have altered our reasoning and reached the same result by stating that because the instruments at issue in *American Board of Trade* were traded on an exchange they fell outside the Treasury Amendment").

The notion that a foreign currency option is never a transaction "in" foreign currency until the option is exercised elevates form over substance and is inconsistent with commercial practice. An option gives the holder a right to obtain foreign currency. The holder of an option anticipates and intends the exercise of the option (and delivery of the currency) if it is "in the money;" in other words, only if there is value to the holder of the option were it to be

exercised.[12] Whether there will be such value will depend on movements in the price of the currency from the purchase date of the option, an entirely unpredictable event. It thus makes no sense—by differentiating between exercised and unexercised options—to let delivery determine whether a transaction is subject to CFTC jurisdiction. To do so would in effect allow unpredictable market forces to determine the legality of a transaction. From a commercial perspective, foreign currency options are transactions "in" foreign currency because foreign currency is the subject of the transactions. *See Salomon Forex, Inc.* v. *Tauber*, 8 F.3d at 975-76.[13]

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[12] To the same extent, the fact that the purchaser of an option may offset or net a transaction, rather than receive actual delivery of foreign currency, does not change the essential nature of the transaction. Similarly, this analysis and the language of the Treasury Amendment are equally applicable when an option agreement provides for a cash payment, rather than delivery of a currency, based on the value of the currency at the time the option is exercised.

[13] Furthermore, as the Fourth Circuit recognized, "[i]f Congress meant for the clause 'transaction in foreign currency' to apply only to transactions in the commodity itself, it would have no reason to exclude futures transactions conducted on an exchange" from the scope of the Treasury Amendment. *Id.* at 975. Yet futures contracts like options do not involve contemporaneous delivery of the commodity and may not result in delivery. These "transactions involve the purchase of a promise—a contract right—and only indirectly concern the underlying subject matter." *Id.*

II.

The CEA prohibits futures or options trading conducted other than on a board of trade designated and regulated by the CFTC as an exchange ("contract market"), unless such activities fall within a statutory exclusion or regulatory exemption. 7 U.S.C. §§ 2, 6, 6c.

The Industry Associations respectfully submit that the Treasury Amendment was intended to exclude from CEA coverage all OTC foreign currency transactions, including OTC options transactions. By eliminating this statutory exclusion for foreign currency options transactions, the Second Circuit's decision casts a cloud of uncertainty over the enforceability of such transactions.[14/]

While there are two possible regulatory exemptions that could render foreign currency options transactions in the Second Circuit enforceable, one of which the Second Circuit referred to in *CFTC* v. *Dunn*, each of these exemptions is significantly more limited in scope than the Treasury Amendment. Furthermore, exemptions by nature are subject to the CFTC's jurisdiction and regulatory discretion. The specific purpose of the Treasury Amendment was to exclude CFTC regulatory limitations and restrictions on the foreign exchange markets. The more limited and conditional CFTC exemptions simply cannot satisfy this objective. In addition to subjecting affected transactions to CFTC jurisdiction and significant resulting legal uncertainties, the Second Circuit's holding thus also subjects these transactions to CFTC

14/ The most likely party to challenge the legality of an option transaction would be a counterparty for which the transaction proves unprofitable. *See Salomon Forex, Inc.* v. *Tauber*, 8 F.3d at 969-70.

discretion to eliminate or further restrict these exemptions contrary to the intent of Congress.[15/]

The trade option exemption, 17 C.F.R. § 32.4, is limited to options transactions offered to a "producer, processor, commercial user and merchant" handling the underlying commodity, who enters into the transaction "solely for purposes related to its business as such." While the Second Circuit opined that the "dire effects [of its holding] are to a degree deflected by the CFTC's trade option exemption," 58 F.3d at 54, in reality, this exemption offers a limited and uncertain degree of protection, to a narrow group of participants depending upon the circumstances and purpose of the transaction.[16/]

15/ For example, the CFTC has recently considered narrowing the scope of the swaps exemption, discussed below, by among other changes further restricting the category of participants eligible for this exemption. *See* CFTC Proposed Rules, *Section 4(c) Contract Market Transactions; Swap Agreements*, 59 Fed. Reg. 54139, *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 26,243, at 42,064 (Oct. 28, 1994). The *amici* submit this is precisely the cloud of regulatory uncertainty that Congress sought to avoid by excluding transactions in foreign currency from the CEA and, hence, CFTC jurisdiction.

16/ *See* CFTC Statutory Interpretation, *Trading in Foreign Currencies for Future Delivery*, 50 Fed. Reg. 42983, *reprinted in* [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,750, at 31,124 n.13 (Oct. 23, 1985); *CFTC Policy Statement Concerning Swap Transactions*, 54 Fed. Reg. 30694, 30695 n.14, *reprinted in* [1987-90 Transfer Binder] ¶ 24,494, at 36,145 n.14 (July 21, 1989); CFTC Interpretative Letter No. 84-7, *Banking Institutions as*

(continued...)

The CFTC Exemption of Swap Agreements ("swaps exemption"), 17 C.F.R. § 35, is limited to currency option transactions (1) that are entered into between "eligible swap participants (ESPs);"[17] (ii) that are "not part of a fungible class of agreements that are standardized as to their material economic terms"; (iii) that take into account as a material consideration the creditworthiness of any party having an actual or potential obligation under the swap agreement; and (iv) that are not "entered into and traded on or through a multilateral transaction facility."[18] These criteria restrict and introduce uncertainty as to the availability of the swaps exemption.

III.

The Second Circuit's ruling also creates an anomalous regulatory environment in which OTC options transactions involving a party that is amenable to suit within the Second Circuit— which includes New York City, the preeminent financial and banking center in the world and the location of some of the largest participants in foreign exchange options transactions— are potentially unenforceable unless the party qualifies for a regulatory exemption. The same options transaction, however, would be enforceable in the Fourth

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[16](...continued)
Purchasers of Foreign Currency Options, [1982-84 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 22,025, at 28,595 (Feb. 22, 1984).

[17] This term excludes certain entities and all natural persons with less than $10 million in assets and entities formed solely for the specific purpose of constituting an ESP.

[18] 17 C.F.R. § 35.2(a)-(d).

Circuit under *Salomon Forex, Inc.* v. *Tauber*, while its enforceability would be an open question in other jurisdictions.

Lack of uniformity among the circuits would encourage enterprising plaintiffs to seek to invalidate their unprofitable options contracts in the Second Circuit, regardless of their location or the situs of their transactions. In turn, defendants amenable to suit within the Second Circuit would be forced to race to court in any other available jurisdiction to file a preemptive suit against a defaulting customer before the latter could potentially sue in the Second Circuit to invalidate an option contract.

The potential for forum shopping and judicial abuse is reason alone for a writ of certiorari to issue to review the judgment of the Second Circuit in order to resolve the conflict between the Circuits.

CONCLUSION

The members of the Industry Associations and other parties engaging in foreign exchange trading now face considerable uncertainty over the enforceability of their options transactions as a result of the Second Circuit's decision. Such uncertainty as to the enforceability of foreign exchange options transactions could drive the United States' portion of these activities overseas while also disadvantaging market participants in this country in global competition. Accordingly, a writ of certiorari should issue to review the decision of the Second Circuit in order to resolve the conflict between the circuits and to eliminate the "potentially dire effects" of the Second Circuit's decision.

Respectfully submitted,

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April 24, 1996

(13)

No. 95-1181

In The

Supreme Court of the United States

October Term, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

v.

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

The following opinion, orders, and brief have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition For A Writ Of Certiorari ("Pet. App."):

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING COMMISSION,	:	94 CIV. 2403
Plaintiff,	:	COMPLAINT FOR *EX PARTE* ORDER, TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIONS AND ANCILLARY EQUITABLE RELIEF FOR VIOLATIONS OF THE COMMODITY EXCHANGE ACT, AS AMENDED, 7 U.S.C. § 1, *ET SEQ.* (SUPP. IV 1992) AND THE REGULATIONS THEREUNDER.
v.	:	
WILLIAM C. DUNN, DELTA CONSULTANTS, INC. DELTA OPTIONS, Ltd., and NOPKINE CO., LTD.,	:	
Defendants.	:	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. WILLIAM C. DUNN, DELTA CONSULTANTS, INC., DELTA OPTIONS, Ltd., and NOPKINE CO., LTD., Defendants.	COMPLAINT FOR *EX PARTE* ORDER, TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIONS AND ANCILLARY EQUITABLE RELIEF FOR VIOLATIONS OF THE COMMODITY EXCHANGE ACT, AS AMENDED, 7 U.S.C. § 1, *ET SEQ.* (SUPP. IV 1992) AND THE REGULATIONS THEREUNDER.

1. Plaintiff Commodity Futures Trading Commission, an independent regulatory agency of the United States, hereby alleges that defendants William C. Dunn, Delta Consultants, Inc., Delta Options, Ltd., and Nopkine Co. Ltd. (collectively, "the Defendants"), have engaged, are engaging and, unless restrained and enjoined, will

continue to engage in acts and practices which constitute violations of Section 4c(b) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6c(b) (Supp. IV 1992), and Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993).

2. Accordingly, pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (Supp. IV 1992), the Commission brings this action to restrain and enjoin such acts and practices, to compel compliance with the provisions of the Act, and to obtain the ancillary relief prayed for and seek such further relief as this Court deems just and appropriate, including, but not limited to, a freeze of the Defendants' assets, appointment of a receiver, and preservation of, and access to, the Defendants' books and records.

I.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (Supp. IV 1992), authorizing the Commission to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice which constitutes a violation of any provision of the Act or the Regulations.

4. Under Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a) (Supp. IV 1992), this Court is empowered, among other things, to enter an *ex parte* order (a) prohibiting destruction, alteration or disposal of books and records, (b) freezing the assets of any person or firm who is or may be violating the Act or Regulations and (c) appointing a temporary equity receiver.

3. Venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (Supp. IV 1992), in that the Defendants are found in, inhabit, or transact business in the Southern District of New York, and the acts and practices in violation of the Act have occurred, are occurring, and are about to occur within the Southern District of New York, among other places.

II.

PARTIES

PLAINTIFF

6. The *Commodity Futures Trading Commission* ("Commission") is an independent regulatory agency of the United States which is charged with responsibility for administering and enforcing the provisions of the Commodity Exchange Act, as amended. The Commission maintains its principal office at 2033 K Street, NW., Washington, D.C. 20581.

DEFENDANTS

7. *William C. Dunn* ("Dunn") is (a) president and sole shareholder of defendant Delta Consultants, Inc., (b) advisor to, and the former managing director of, defendant delta Options, Ltd., and (c) advisor to defendant Nopkine Co. Ltd. Dunn resides at 20 Mountainside Road, Mendham, New Jersey 07945. He is not now, and never has been, registered with the Commission in any capacity.

8. *Delta Consultants, Inc.* ("Delta Consultants") is a New Jersey corporation which was formed by Dunn in 1974 and maintains its principal place of business at Jockey Hollow Professional Park, Suite #16, Cold Hill

Road, Mendham, New Jersey 07945. Delta Consultants is not now, and never has been, registered with the Commission in any capacity.

9. *Delta Options, Ltd.* ("Delta Options"), is an unregulated investment company which was incorporated in the Bahamas in 1991. Delta Options uses as its mailing address P.O. Box N-8865, Nassau, Bahamas. It is not now, and never has been, registered with the Commission in any capacity.

10. *Nopkine Co. Ltd.* ("Nopkine") is an unregulated investment company which was incorporated in the British Virgin Islands in 1993. Nopkine uses as its mailing address P.O. Box 3149, Pasea Estate, Road Town, Tortola, British Virgin Islands. Promotional materials distributed to prospective customers of Nopkine describe Dunn as a trading advisor to, and as a "key person" of, Nopkine. Nopkine is not now, and never has been, registered with the Commission in any capacity.

III.

GENERAL ALLEGATIONS

11. Since 1992, Dunn, Delta Consultants and Delta Options, acting directly and through marketing agents under their supervision and control, have solicited and accepted, and continue to solicit and accept, funds for investment with Delta Options from customers in the United States and abroad. At least some of these funds have been deposited in accounts carried in the name of Delta Options at banks in New York City.

12. The funds referred to in paragraph 11 are commingled and used by Dunn, Delta Consultants and Delta Options for, among other purposes, purchasing and writing "put" options and "call" options on commodities regulated under Section 1a(3) of the Act, 7 U.S.C. § 1a(3) (Supp. IV 1992), including, but not necessarily limited to, options on Japanese yen, Australian dollars, German marks, British pounds, Canadian dollars and Swiss francs, in connection with various "investment strategies" managed by Delta Options and advised by Dunn and Delta Consultants. As compensation for its services, Delta Options receives 30% of all realized trading profits, in the form of an incentive fee.

13. By way of example, one "investment strategy" described to Delta Options customers involves the purchase of purportedly hedged baskets of out-of-the-money "call" options and "put" options involving three or more currencies with maturity dates several months forward. The positions thus established are subsequently liquidated by writing "call" and "put" options close to expiration. At least some of these option transactions have been executed between Delta Options, on the one hand, and banks in New York City, on the other.

14. On or about July 1, 1993, Dunn, acting in his capacity as president of Delta Consultants, claimed to be managing at least $180 million in customer funds which had been invested with Delta Options. On or about November 26, 1993, Dunn and Delta Consultants advised Delta Options that its customers had suffered losses of $95 million, a fact which previously had been undisclosed.

15. Since at least July 1993, Dunn and Nopkine, acting directly and through marketing agents under their supervision and control, have solicited and accepted, and continue to solicit and accept, funds for investment with Nopkine from customers in the United States and abroad.

16. The funds referred to in paragraph 15 are commingled and used by Dunn and Nopkine for, among other purposes, purchasing and writing "put" options and "call" options on commodities regulated under Section 1a(3) of the Act, 7 U.S.C. § 1a(3) (Supp. IV 1992), including, but not limited to, options on Japanese yen, Australian dollars, German marks, British pounds, Canadian dollars and Swiss francs, in connection with trading activities carried out by Nopkine and advised by Dunn. As compensation for its services, Nopkine receives 30% of all realized trading profits, in the form of an incentive fee.

17. Upon information and belief, as of September 21, 1993, Nopkine was managing at least $44 million in customer funds.

18. At all times relevant hereto and continuing to the present, Dunn has made or participated in all decisions concerning the use of customer funds invested with Delta Options and Nopkine, including, but not limited to, all trading decisions.

19. Upon information and belief, Dunn, Delta Consultants, Delta Options and Nopkine, at all times relevant hereto and continuing to the present, either (a) did not make or (b) made, but did not keep, systematic trading, financial and other records reflecting the receipt and use of customer funds.

IV.

VIOLATIONS OF THE COMMODITY EXCHANGE ACT AND THE REGULATIONS

COUNT ONE

VIOLATIONS OF SECTION 4c(b) OF THE ACT AND COMMISSION REGULATION 32.9: FRAUD IN CONNECTION WITH COMMODITY OPTION TRANSACTIONS

20. The allegations set forth in paragraphs 1 through 19 are realleged and incorporated herein by reference.

21. Pursuant to Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), no person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under the Act which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

22. Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993), makes it unlawful for any person, directly or indirectly, to (a) cheat or defraud or attempt to cheat or defraud any other person, (b) make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof, or (c) deceive or attempt to deceive any other person by any means whatsoever, in or in connection

with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction.

23. Since 1992, in marketing "investment strategies" involving the purchase and writing of options on foreign currencies, Dunn, Delta Consultants and Delta Options have made false, misleading and/or deceptive representations to existing and prospective customers concerning, among other things, (a) the likelihood of profit, and the risk of loss, associated with trading options on foreign currencies, (b) the nature of the "investment strategies" being marked by them and (c) the true status of the funds invested with Delta Options, including, but not limited to, the following:

A. A statement, made in one or more explanatory memoranda distributed to customers of Delta Options in 1992 and 1993, that "returns in a volatile year can range from 35% to 50% p.a. and in a poor year from 10%-20% p.a. This does not take account of the extra gains to be made from 'rolling' from one strangle position to another."

B. A statement, made in one or more explanatory memoranda distributed to customers of Delta Options in 1992 and 1993, that Delta Consultants "[is] prepared to guarantee 90% of investor's capital and to advise clients should a 2.5% loss result before continuing with the investment. Again, the risk of this is low as funds are only committed gradually as profit builds up."

C. A statement, made in one or more explanatory memoranda distributed to customers

of Delta Options in 1992 and 1993, that "[t]here are few if any investments which can provide such high returns with reasonable consistency using essentially a low risk strategy."

D. A statement, made in one or more explanatory memoranda distributed to customers of Delta Options in 1992 and 1993, that the "currency investment opportunities" being offered to them have "potential gross yields" of from 15 to 35% and "carry relatively low risk."

E. Statements, routinely made to customers of Delta Options as their funds were invested in specific positions maturing on denominated dates, that Delta Options would (i) notify them immediately when the position showed a loss of 2.5%, (ii) discuss the position with them if the loss level reached 2.5, 5.0 and 7.5%, and (iii) close the position when the loss reached 10%.

F. Statements, made in written reports distributed to customers of Delta Options *after* at least several customers had expressed concern over the safety of their funds, (i) that the principal invested in the position maturing on September 27, 1993, and all profits, had been, or were being, remitted to customers and (ii) that the customers whose funds had been invested in the position maturing on September 27, 1993, would receive a return of 11.0% on invested funds and 5.0% on uninvested funds.

G. Statements, made on or about October 12, 1993, to all customers of Delta Options, that

they would be repaid "in full, plus all profits."

H. A statement, made in a written communication dated October 30, 1993, from Delta Consultants to Delta Options, that "sufficient funds are available to repay all [Delta Options] investors with profits."

I. A statement, made in a written communication dated November 7, 1993, from Dunn to the customers of Delta Options that "[t]he initial objective of safeguarding investor funds with the profits intact is still being met. . . . "

24. At the time the statements referred to in paragraph 23 were made, Dunn, Delta Consultants and Delta Options either knew the statements were false or had no reason to believe they were true. For example, despite the representations referred to in paragraph 23, a number of Delta Options customers whose funds were invested in positions purportedly maturing on August 27, 1993 and September 27, 1993, have not been repaid in full and have not received any profits.

25. Since 1993, in marketing "investment strategies" involving the purchase and writing of options on foreign currencies, Dunn and Nopkine have made false, misleading and/or deceptive representations to existing and prospective customers of Nopkine, concerning, among other things, (a) the likelihood of profit, and the risk of loss, associated with trading options on foreign currencies and (b) the true status of the funds invested with Nopkine, including, but not limited to, statements made to at least one customer of Nopkine whose funds had been invested

in a position maturing on December 15, 1993, that Nopkine would (i) notify the customer immediately when the position had a 2.5% loss, (ii) discuss the position with the customer at loss levels of 2.5%, 5.0%, and 7.5% and (iii) close the position if the loss reached 10.0%.

26. At the time the statements referred to in paragraph 25 were made, Dunn and Nopkine either knew the statements were false or had no reason to believe they were true. For example, despite the representations referred to in paragraph 25, the customer lost 36% of the $82,520.19 which he had invested in the position purportedly maturing on December 15, 1993.

27. Dunn, Delta Consultants, Delta Options and Nopkine are each directly liable for violating Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), and Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993).

28. Pursuant to Sections 13(a) and 13(b) of the Act, 7 U.S.C. §§ 13c(a) and 13c(b) (Supp. IV 1992), Dunn is liable for any violations of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), and Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993), by Delta Consultants, Delta Options, Nopkine and others, in that he willfully aided and abetted such violations and/or he, directly or indirectly, controlled persons including, but not limited to, Delta Consultants, Delta Options and Nopkine, and did not act in good faith or knowingly induced, directly or indirectly, the acts, omissions or failures constituting such violations.

V.

RELIEF REQUESTED

WHEREFORE, Plaintiff, the Commodity Futures Trading Commission, respectfully requests that this Court enter:

A. An *ex parte* Restraining Order prohibiting Defendants and their officers, agents, servants, employees, attorneys-in-fact, successors, assigns, directors, subsidiaries, affiliates and any other persons or entities in active concert or participation with any of them as well as any other person or entity who receives actual notice of such order by personal service or otherwise, directly or indirectly, from:

(1) Withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property of Defendants, and any successors thereof, wherever situated, whether under their actual or constructive ownership, possession, custody or control, until further order of the Court;

(2) Destroying, altering or disposing of the books, records, documents, correspondence, brochures, manuals, diaries, bank records, commodity trading records, customer lists, ledgers or other property of Defendants, and any successors thereof, wherever situated, until further order of the Court; and

(3) Refusing immediate access to the Commission staff to the books and records of Defendants, and any successors thereof, wherever situated.

B. In the case of a bank or other depository which may have or could exercise custody or control over assets and books and records of the Defendants which are hereby enjoined from, among other things, withdrawal, transfer, removal, dissipation, disposal, destruction, alteration and refusal of immediate access to the Commission, such *ex parte* Restraining Order shall reach any such assets or records wherever situated, in or outside the United States, held by any holding company, branch, division, parent, subsidiary, correspondent, nominee, assign, agent or any person or entity which is in any manner related to any bank or depository receiving this order.

C. Orders of preliminary and permanent injunction, restraining and enjoining Defendants and any other officers, agents, servants, employees, attorneys-in-fact, successors, assigns, directors, subsidiaries and affiliates, and any other persons or entities in active concert or participation with them who receive actual notice of such order by personal service or otherwise, from, directly or indirectly, (a) cheating or defrauding, or attempting to cheat or defraud, any other person, (b) making or causing to be made to any other person any false report or statement thereof or causing to be entered for any person any false record thereof, or (c) deceiving or attempting to deceive any other person by any means whatsoever, in or in connection with an offer to enter into, the entry into or the confirmation of the execution of any commodity option transaction in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (Supp. IV 1992), or Commission Regulation 32.9, 17 C.F.R. § 32.9 (1993);

D. An order appointing a temporary equity receiver, and subsequently a permanent equity receiver, to take immediate custody, control, and possession of all assets and property belonging to, or in the possession, custody and control of Defendants, and any successors thereof, including, but not limited to, books and records of account and original entry, electronically-stored data, funds, securities, commodity accounts, bank and trust accounts, real or personal property, premises, contents of safety deposit boxes, precious metals, currencies, coins, and any other assets wherever situated; and authorizing, empowering, and directing such receiver to collect and take charge of, hold and administer the same subject to further order of this Court, in order to prevent irreparable loss, damage and injury to customers of Defendants, and any successors thereof, and to conserve and prevent the dissipation of funds, and to remove Defendants and other management personnel from control and management of Delta Consultants, Delta Options and Nopkine, and to prevent further evasions and violations of the Act and Regulations by Defendants, and to have such other and further powers as this Court may direct.

E. An order directing that an accounting be made of all assets and liabilities of Defendants, and any successors thereof, together with all funds received and paid out, in or in connection with all commodity option transactions, from the dates Delta Options and Nopkine began operations, to and including the date of such accounting; together with an accounting of all salaries, commissions, fees, loans, and other disbursements of money and property of any kind, in or in connection with commodity option transactions, from the date Defendants began

operations, to and including the date of such accounting; and that such accounting shall be accomplished under the supervision of the equity receiver or such other officer as the Court may appoint or designate, or upon such terms and conditions as the Court may deem appropriate.

F. An order directing the Defendants, and any successors thereof, to disgorge to the equity receiver appointed herein or pursuant to such other procedure as the Court may order, all benefits received, including, but not limited to, salaries, commissions, fees, and trading profits derived, directly or indirectly, from acts or practices which constitute violations of the Act and Regulations as described herein.

G. An order of restitution directing Defendants to make whole each and every customer whose funds were received by the Defendants in violation of the provisions of the Act, as described herein;

H. An order rescinding all contracts entered into by Defendants with any customer; and

I. Any such other and further relief as the Court may deem necessary and appropriate.

Respectfully submitted,

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Dated: April 5, 1994
New York, New York

No. 95-1181

In The

Supreme Court of the United States

October Term, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the "Treasury Amendment" to the Commodity Exchange Act ("CEA"), 7 U.S.C. § 2(ii) – which provides in pertinent part that "Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade" – exempts off-exchange foreign currency options from CEA regulation.

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JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A timely petition for rehearing and a suggestion for rehearing en banc was denied on August 4, 1995. Pet. App. 1c-2c. On December 12, 1995, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including January 23, 1996. A timely petition for a writ of certiorari was filed on January 23, 1996 and granted on May 28, 1996. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the Commodity Exchange Act, 7 U.S.C. § 2(ii), provides in full as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

STATEMENT

A. Background

Petitioner William C. Dunn is the President of Petitioner Delta Consultants, Inc., which served as an advisor to certain investment companies (including respondent Delta Options, Ltd. – "Options"),[1] for off-exchange foreign currency transactions, including options. JA 6-7. During 1993, Options had customer investments of approximately $180 million; in November of 1993, it advised investors that it had sustained trading losses of approximately $95 million. JA 8.

The foreign currency options transactions engaged in by Petitioners – with such major banks as Credit Lyonnais, Bank Julius Baer & Co. Ltd., Societe Generale, and The Chase Manhattan Bank, N.A. – were not executed on any "exchange" or "board of trade." Instead, they were part of an established, international, off-exchange, interbank market, where trades are entered into individually between the participants – with different specifications and duration. Such off-exchange foreign currency options transactions are normally made on a daily basis for institutional foreign currency banks, dealers, and speculators – and are different from the standardized foreign currency contracts traded on exchanges (and regulated by the CFTC).[2] On any given day, hundreds of billions of

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[1] Respondent Nopkine Co., Ltd. has not appeared in this action; Options is in liquidation in the Bahamas.

[2] *See* Amicus Curiae Brief in Support of The Petition for a Writ of Certiorari of the Foreign Exchange Committee, the New York Clearing House Association, the Futures Industry Association, the Managed Futures Association, and the Public

dollars' worth of currency are bought and sold, and trillions of dollars' worth of foreign exchange contracts are outstanding. *See* Amicus Curiae Brief of the Foreign Exchange Committee and the New York Clearing House Association, *CFTC v. Dunn* (2d Cir. No. 94-6197) at 5-6. Foreign currency options, in particular, are essential to enable businesses and governments to hedge against the risk of adverse exchange rate movements. *Id.* at 4-6.

B. The Commodity Exchange Act and the Treasury Amendment Thereto

The Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq.*, establishes a comprehensive system for regulating commodity futures and options contracts.[3] However, it does not regulate either "spot" transactions (in which the

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Securities Association (U.S.S.C. No. 95-1181) at 4-5 (noting that such trading has been occurring for years "with the understanding that [these] activities were excluded from regulation by the [CFTC] under the [CEA]"), and *id.* at 7-8 (noting the "global significance of these markets" and that the " 'great bulk' of options in foreign currency are traded in OTC markets, while exchange-traded foreign currency options constitute a 'small part' of the total.")

[3] A futures contract is an agreement to make or take delivery of a specific amount of a commodity at an agreed-upon price, on a specified future date. John Downes & Jordan Elliot Goodman, *Dictionary of Finance & Investment Terms* at 168 (Barron's Financial Guides, 3d ed. 1993); *Options, Essential Concepts and Trading Strategies* at 385 (The Options Institute 1990). An option is an agreement that gives the purchaser the right, but not the obligation, to purchase (a "call" option) or to sell (a "put" option) a specified amount of a commodity, at an agreed-upon price, on or before a specified future date. Downes & Goodman, *supra*, at 297-98; *Options*, *supra*, at 389.

commodity is delivered at or near the time of sale), or "forward" transactions (in which one party purchases a commodity, but delivery is deferred).[4] 7 U.S.C. § 2.

In 1974, Congress substantially amended the CEA, and *inter alia*, "created an independent agency, the CFTC, and entrusted to it sweeping authority to implement the CEA." *CFTC v. Schor*, 478 U.S. 833, 836 (1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 366 (1982). Additionally, these amendments substantially broadened the scope of the "commodity" contracts that were subject to regulation. Whereas the CEA previously had governed only futures and options in certain agricultural products, these amendments expanded its coverage. Thus, a "commodity" was broadly defined in 7 U.S.C. § 1(a)(3), as including "all other goods and articles, except onions . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in," and 7 U.S.C. § 2(i), provided for broad CFTC authority:

> The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option," . . .) and transactions involving contracts of sale of a commodity for future

[4] Both "spot" and "forward" transactions are made in the interbank market. "Spot transactions are usually settled within two business days. Forwards are usually quoted for one, two, three, six, and twelve months." *Report on Exchanges of Futures for Physicals* (CFTC Division of Trading & Markets, Oct. 1, 1987) (the "CFTC EFP Report") at 124.

> delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market. . . .

However, the "Treasury Amendment" – also enacted in 1974 as the immediately following subsection, 7 U.S.C. § 2(ii) – provides an express exemption from CEA regulation over off-exchange "transactions in foreign currency":

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

This exemption expressly excludes from CEA regulation all "transactions in foreign currency" where trading is not conducted on a "board of trade" (or "exchange").[5]

C. Proceedings in the District Court

On April 5, 1994, the CFTC brought this action alleging that all defendants, including Petitioners, violated the CEA by utilizing customer investments to enter into off-exchange foreign currency options with banks in New

[5] The Solicitor General has conceded that the options here were traded "outside of an organized exchange." Solicitor General's Brief In Opposition To Petition For A Writ Of Certiorari ("Solicitor General Opp.") at (I); *id.* at 11-12. Thus, the exception within the Treasury Amendment for transactions conducted "on a board of trade" (or "exchange") – which was intended to apply to trading "conducted on a formally organized futures exchange" S. Rep. 1131, 93d Cong., 2d Sess. 23 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 5843, 5863 – is not at issue in this case.

York City.[6] JA 8. The Complaint alleged that Petitioners' off-exchange foreign currency options transactions were made contrary to regulations of the CFTC, in violation of 7 U.S.C. § 6c(b). JA 10-14. As relief, the complaint sought, *inter alia*, the appointment of a temporary equity receiver. JA 17.

Petitioners argued that the Treasury Amendment exempted their off-exchange transactions in foreign currency options from CEA regulation, and thus the district court was without subject matter jurisdiction. On June 23, 1994, the district court rejected Petitioners' contention and appointed a temporary equity receiver, Pet. App. 1b-4b, supporting such action in a July 1, 1994 memorandum opinion citing the Second Circuit's decision in *CFTC v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986). Pet. App. 6b.

D. Proceedings in the Court of Appeals

Pursuant to 28 U.S.C. § 1292(a)(2), Petitioners filed an interlocutory appeal from the order appointing a receiver. In an opinion dated June 23, 1995, the Second Circuit affirmed the district court's ruling – although the panel did not independently analyze whether the Treasury Amendment exempts off-exchange foreign currency

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[6] To the extent that individuals invested with Petitioners (and have filed civil lawsuits in the Southern District of New York to recover their losses), they did not enter into options or futures contracts. However, the CFTC purported to assert jurisdiction based upon Petitioners' use of the invested funds to enter into the off-exchange options contracts with banks in New York City. JA 5-6.

options from CEA regulation. Pet. App. 1a-7a. Instead, it held that it was "foreclosed by clear precedent in this circuit that holds that the term 'transaction in foreign currency' does not include options, even those options traded *off*-exchange" (*id.*, 6a) – citing the *American Board of Trade* decision by a prior panel.

There, in a case involving *exchange* trading,[7] the Second Circuit held that an option did not become a "transaction in foreign currency" until it was exercised and currency actually was exchanged. 803 F.2d at 1248-49. Nevertheless, the decision below declined to treat the construction of "transactions in foreign currency" in *American Board of Trade* as *dicta*. Although acknowledging that the prior panel's reasoning may have been "broader than necessary," the court below held that it had no authority to reconsider its *ratio decidendi*, noting:

> Whatever doubts this panel may have about the interpretation given the Treasury Amendment in *American Board of Trade*, therefore, are not grounds for our declining to follow it.

Pet. App. 6a.

The panel below correctly acknowledged that its interpretation of the Treasury Amendment conflicted with that of the Fourth Circuit in *Salomon Forex, Inc. v.*

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[7] The defendant in *American Board of Trade* was specifically described by the Second Circuit as "an organization that provided, *inter alia*, an exchange or market place for certain commodity options transactions." 803 F.2d at 1244. Thus, the Treasury Amendment exemption was not applicable – as that exemption is qualified by the phrase "unless such transactions involve the sale thereof for future delivery conducted on a board of trade."

Tauber, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994), stating: "This conflict is for the Supreme Court, not us, to resolve." Pet. App. 6a.

SUMMARY OF ARGUMENT

1. The plain meaning of the Treasury Amendment excludes all off-exchange foreign currency transactions – including options – from regulation under the CEA. "Transaction" is an extremely broad word that encompasses a wide variety of commercial arrangements, including options. Indeed, Congress used the word "transaction" to describe options when delineating the jurisdiction of the CFTC in the same section of the CEA that contains the Treasury Amendment. Having understood "transaction" to include options in the context of establishing the CFTC's jurisdiction, Congress could not have intended a different meaning when creating an exception to that jurisdiction. Since the Treasury Amendment exempts from CEA regulation "transactions in foreign currency" that are not "conducted on a board of trade," such options that are not traded on a "board of trade" (*i.e.* off-exchange options) are not subject to regulation under the CEA.

The Second Circuit's construction of the Treasury Amendment to include only foreign currency options which are exercised, is untenable. First, as previously argued by the United States, it is based on an erroneous interpretation of the Treasury Amendment and is inconsistent with its statutory purpose. Additionally, it is illogical, contradicts economic reality, and would lead to the

unreasonable result where the legality of millions of dollars of options trades would hinge on subsequent and unpredictable market forces; Congress could not have intended to inject such uncertainty into the CEA's regulatory scheme.

2. The Congressional purpose in enacting the Treasury Amendment was to exclude *all* "transactions in foreign currency" from CEA regulation. Congress enacted the Treasury Amendment at the specific request of the Treasury Department, which had expressed concern that proposed expansion of the CFTC's jurisdiction would interfere with the significant and efficient off-exchange foreign currency market. As outlined in a letter from the Treasury Department to Congress, it was concerned with the potentially adverse effects CFTC jurisdiction could have on the trillion dollar off-exchange foreign currency market used by banks, international businesses, and professional traders to hedge against foreign currency risks. Off-exchange foreign currency options fall squarely within the market sector sought to be protected. Accordingly, the decision below subjecting such transactions to CEA regulation is inconsistent not only with the statute's express language, but also with its specific congressional intent.

3. Where, as here, the language and congressional purpose of a statute are clear, resort to agency interpretation is unnecessary. However, the Treasury Department – whose concerns the Treasury Amendment was specifically adopted to address – consistently has stated that off-exchange foreign currency options are not subject to regulation under the CEA.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE TREASURY AMENDMENT PRECLUDES CEA REGULATION OVER ALL OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS – INCLUDING OPTIONS

This Court has emphasized that the principal basis (and frequently the only one) for construing the meaning of a statute "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (plain language "must ordinarily be regarded as conclusive"); *Rake v. Wade*, 508 U.S. 464, 471 (1993) (where a statute is clear, the court's "sole function . . . is to enforce it according to its terms," quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it").

Here, the plain language of the words "transactions in foreign currency" means any commercial dealings involving foreign currency. The term "transaction" is extremely broad, and normally applies to a wide range of commercial dealings and arrangements. *See Webster's Third New International Dictionary of the English Language* at 2425-26 (1996) (defining "transaction" as "a communicative action or activity involving two parties or two things reciprocally affecting or influencing each other"); *Black's Law Dictionary* at 1496 (6th ed. 1990) (defining "transaction" as an "[a]ct of transacting or conducting

any business" and "embrac[ing] every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons").[8]

Thus, the plain meaning of the Treasury Amendment excludes from the CEA *all* off-exchange "transactions in foreign currency," including options. The purchase or sale of an off-exchange foreign currency option is itself a "transaction," which provides the holder the right to purchase or sell foreign currency. Such a transaction is a "transaction in foreign currency" because its subject matter is foreign currency. There was no need to separately deal with "options," as they were part of the generally excluded "transactions in foreign currency."

The decision below attempted to carve foreign currency *options* out of the universe of foreign currency *transactions* generally – by following the reasoning of *American Board of Trade* that the "transactions in" language of the Treasury Amendment does not include foreign currency options, Pet. App. 5a-6a. Although the court below expressed doubts as to that reasoning, Pet. App. at 6a – which, in turn, relied on *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) – it adopted the conclusion of those decisions, and held "an option [is] simply the right

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[8] Additionally, the preposition "in" means "involving" or "concerning"; it commonly is used to denote inclusion with relation to a group as a whole. *See Webster's, supra*, at 1139 (defining "in" "as a function word to indicate," among other things, "the fact of belonging to a group or association," "close connection by way of implication or active participation," and "engagement in a business identified with a particular commodity.")

to engage in a transaction in the future, and, until this right mature[s], there [is] no exempt 'transaction.' " Pet. App. 6a. *See American Board of Trade*, 803 F.2d at 1248 (an option "does not become a 'transaction[ ] in' that currency unless and until the option is exercised"); *Chicago Board of Trade*, 677 F.2d at 1154 ("[o]nly when the option holder exercises the option is there a transaction in a government security").[9] That conclusion is flawed for three main reasons.

1. The purchase or sale of a foreign currency option – not just the exercise of that option – is a "transaction" in foreign currency within the meaning of the Treasury Amendment. That interpretation of "transaction" is consistent with the broad usage of transaction elsewhere in the CEA, where it also refers to options. In fact, in the *same section* of the CEA that includes the Treasury Amendment, the term "transaction" is used to refer to options and other related arrangements:

> The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any *transaction* which is of the character of, or is commonly known to the trade as, an "*option*", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and *transactions* involving contracts of sale of a commodity for future delivery. . . .

7 U.S.C. § 2(i) (emphasis added) Moreover, the same words are "used elsewhere in the [CEA] to mean all

[9] *Chicago Board of Trade* involved a jurisdictional dispute between the CFTC and SEC as to which agency had authority over organized *exchange* trading in options on GNMA securities.

transactions *involving* the commodity." *Salomon Forex*, 8 F.3d at 976 (citing 7 U.S.C. § 5: "*Transactions in commodities* involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest").

"Presumptively, 'identical words used in different parts of the same act are intended to have the same meaning.' " *United States Nat'l Bank v. Independent Ins. Agents*, 508 U.S. 439, 460 (1993) (quoting *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993)). That presumption is even stronger here in view of Congress' use of the same word in the *same* part of the statute. Having understood "transaction" to include options in the context of establishing the CFTC's jurisdiction under the CEA, Congress hardly could have intended a contrary meaning in the Treasury Amendment – which creates an exception to that jurisdiction. Since the Treasury Amendment exempts from CEA regulation "transactions in foreign currency" (except those "conducted on a board of trade"), off-exchange foreign currency options are not regulated by the CEA.

2. Moreover, reading "transactions in foreign currency" to exclude options would create a distinction between off-exchange "futures" (which would be exempt from CEA regulation by the Treasury Amendment)[10] and

[10] The phrase "transactions in foreign currency" must be read to include future interests in order to give meaning to the qualifying clause "unless such transactions involve the sale thereof for future delivery conducted on a board of trade." *See Salomon Forex*, 8 F.3d at 975.

"options" (which would not be exempt). Such a distinction is completely illogical. Both futures and options hedge and/or shift risk, and "it is almost always possible to devise an option with the same economic attributes as a futures contract (and the reverse)." *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 543 (7th Cir. 1989), *reh'g denied en banc*, U.S. App. LEXIS 16280, *cert. denied*, 496 U.S. 936 (1990). "Since trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context." *Salomon Forex*, 8 F.3d at 976. Accordingly, there is no valid basis on which to differentiate options from other forms of "transactions in foreign currency" – all of which are excluded by the Treasury Amendment.

3. Furthermore, an interpretation of "transactions in foreign currency" as including only exercised options would create a situation where the legality of off-exchange option transactions in foreign currency would depend on whether subsequent market conditions – unknowable when the options are entered, as their value varies according to the price of the underlying currency – ultimately became favorable to their exercise.[11]

Since the decision as to when or whether to exercise any option is dependent on the profitability involved, future movements in the foreign currency market would

[11] "A purchaser will not exercise an option until the market price of the underlying is greater than the exercise price for a call option or less than the exercise price for a put option." United States General Accounting Office Report to Congressional Requesters, *Financial Derivatives: Actions Needed to Protect the Financial System*, p.27 (May 1994).

control the choice to exercise, and thus the legality of that "transaction in" foreign currency. Therefore, a construction of the phrase "transactions in foreign currency" that would limit its scope to exercised options would make application of the Treasury Amendment – and hence the legality of the transaction – wholly dependent upon unpredictable market forces; Congress could not have intended to inject such uncertainty into the CEA's regulatory scheme.[12] However, such unpredictability would be avoided by following the statutory language – which excludes *all* off-exchange "transactions in foreign currency" (including options).

Thus, the interpretation of the Treasury Amendment offered by the court below clearly would lead to an unreasonable result – since jurisdiction would be based on uncontrollable events in the future. Such a result would be contrary to what "has been called a golden rule of statutory interpretation" – namely "that unreasonableness of the result produced by" such an interpretation "is reason for rejecting that interpretation in favor of another which would produce a reasonable result." Sutherland, *Statutory Construction*, § 45.12 (5th ed. 1992). *See also Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

[12] Congress has recognized "the need to create legal certainty for a number of existing categories of instruments which trade today outside of the forum of a designated contract market." H. R. Rep. Conf. No. 978, 102d Cong., 2d Sess. at 80 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3103.

Accordingly, in light of the precise language of the Treasury Amendment, its exemption applies to *all* "transactions in foreign currency," including options. Petitioners were "engaged in off-exchange trading of the sort exempted from coverage of the CEA by the Treasury Amendment." *Salomon Forex*, 8 F.3d at 978. Where, as here, the words of the statute are clear, resort to legislative intent is unnecessary and irrelevant. *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 808-09 n.3 (1989); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991).[13]

II. THE PURPOSE OF CONGRESS IN ADOPTING THE TREASURY AMENDMENT WAS TO EXCLUDE ALL TRANSACTIONS IN FOREIGN CURRENCY

The Treasury Amendment was enacted in response to specific concerns raised by the Treasury Department that the proposed expansion of the CEA to include non-agricultural commodities, as well as the potential exercise of broad jurisdiction by the CFTC over foreign currency transactions, would adversely impact already existing off-exchange markets. As noted in the *CFTC EFP Report* at 125, "[t]here are several categories of participants in the

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[13] Nevertheless, a review of its congressional purpose supports Petitioners' contention that the Treasury Amendment was specifically intended to, and does exclude off-exchange foreign currency options from the reach of the CEA. Indeed, it was a specific congressional response to the precise concerns expressed by the Treasury Department that off-exchange foreign currency transactions (such as those engaged in by Petitioners) *not* be regulated under the CEA.

foreign exchange ('forex') market" – which include "fund managers and professional traders," such as Petitioners – as well as:

> *Central banks* (such as the Bank of England) use forex markets to manage their forex reserves, and also to adjust the value of their respective currencies through purchases or sales of their own or other currencies. *Bank and non-bank foreign exchange dealers* (including many FCMs) execute forex orders for their own accounts and sometimes also act as brokers for customers. . . . *Multinational corporations, domestic corporations, importers and exporters, and individuals* execute forex transactions to facilitate normal business transactions in which they must make payments in currencies other than their domestic currency. . . . As in all markets, *speculators* participate to profit from price changes. . . . *Arbitrageurs*, who profit by simultaneously buying and selling currencies to take advantage of price discrepancies, are particularly important participants in the forex market.

Id. at 121-22 (emphasis added).

The Treasury Department expressed its concerns as to the continued efficacy of the off-exchange foreign currency markets in a letter dated July 30, 1974, from its General Counsel to the Chairman of the Senate Committee on Agriculture and Forestry, stating in part:

> The Department believes the bills contain an ambiguity that should be clarified. The provisions of the bills do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of futures trading on

> organized exchanges, and would not extend to futures trading in foreign currencies off organized exchanges . . . .
>
> The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency. Virtually all futures trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements.

S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5887-88.[14]

The specific concerns expressed by the Treasury Department were that such regulatory restrictions, as well as the possible application of the CEA to off-exchange foreign currency transactions, would be "a serious defect in the proposed legislation that would, if enacted, impair the usefulness and efficiency of our foreign exchange markets." *Id.* at 5888. Accordingly, the letter "strongly urge[d] the Committee to amend the proposed legislation" to clarify "that its provisions would not be applicable to futures trading in foreign currencies

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[14] Risk hedging is one of the principal functions of foreign currency options. *See* CEA, Legislative Findings, 7 U.S.C. § 5 (options "may be utilized by commercial and other entities for risk shifting and other purposes"); W.H. Sutton, *Trading In Currency Options* (1988) at 17 (the "main purpose" of the off-exchange foreign currency market is "as a hedging medium").

or other financial transactions of the nature described above other than on organized exchanges." *Id.* at 5889.

The Treasury Department then proposed specific exclusionary language, which was enacted virtually verbatim in the Treasury Amendment. "This Treasury request and direct congressional response is revealing" (*Salomon Forex*, 8 F.3d at 976) – in its indication of congressional intent to accept the Treasury Department's suggestion that *all* foreign currency transactions conducted *off* organized exchanges be excluded from CEA coverage.

> The Commission will have exclusive jurisdiction over *options trading in commodities* (but not in securities). However, *transactions in foreign currency* . . . would not be subject to the Act unless they involve the sale thereof for future delivery conducted on a board of trade.

S. Rep. No. 1131, *reprinted in* 1974 U.S.C.C.A.N. at 5870 (emphasis added). *See also id.* at 5863 (where the Senate Agriculture and Forestry Committee stated that the Treasury Amendment was included "to clarify that the provisions of the bill are not applicable to trading in foreign currencies" except where "such trading is conducted on a formally organized futures exchange"); *Salomon Forex*, 8 F.3d at 976-77 (the concern leading to the adoption of the Treasury Amendment "was that the informal network of established dealers in foreign currency-based investments would otherwise be brought within the ambit of the CEA," and the Treasury Amendment "drew a distinction between the 'informal network of banks and dealers' intended to be excluded and 'the participants on organized exchanges.' ").

CEA regulation of the off-exchange foreign currency market would reduce efficiency, inhibit innovation in the development of new financial mechanisms, result in higher costs, and damage the United States' ability to compete in the world market. *See Salomon Forex*, 8 F.3d at 974 (citing arguments of *amici*). Additionally, regulation of the United States involvement in the foreign currency markets "would result in extra-ordinary costs and would damage the United States' ability to compete as a world financial center," and would "adversely affect the large and developing global market in foreign currency forwards and options in which the 1989 average daily turnover approximated $50 billion." *Id.* (citing Amicus Curiae Brief of Foreign Exchange Committee). In short, CEA regulation of this important market (as decided by the court below) could "disrupt the United States and worldwide foreign currency markets, sap liquidity from the markets, [and] drive trading offshore." *Id.* at 8.

Thus, in deference to these concerns, when the 1974 amendments to the CEA were enacted, all off-exchange foreign currency transactions (such as those engaged in by Petitioners) were specifically exempted from regulation under the CEA – except only those "for future delivery . . . conducted on boards of trade" (i.e., exchange trading, which was not engaged in by Petitioners, who instead traded exclusively in the off-exchange, interbank market).

III. THE TREASURY DEPARTMENT CONSISTENTLY HAS CONSTRUED OFF-EXCHANGE FOREIGN CURRENCY OPTIONS TRANSACTIONS TO BE WITHIN THE TREASURY AMENDMENT'S EXCLUSION FROM CEA REGULATION

As set forth above, both the plain language of the Treasury Amendment and its congressional purpose unambiguously establish an intent to exclude all off-exchange transactions in foreign currency – including options – from regulation under the CEA. Fundamental principles of statutory interpretation clearly indicate the primary significance of statutory language and congressional intent – despite any agency interpretation to the contrary. *See Federal Election Comm'n v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 32 (1981) (a court "must reject" agency interpretations "that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement"). As held in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 and n.9 (1984) (citations omitted):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.

See also Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) (plain meaning of legislation is conclusive except in rare circumstances where literal application of a statute would lead to a result demonstratively at odds with congressional intent); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978) (agency interpretation cannot overcome "clear contrary indications in statute itself"); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973) (Court is not obligated to "rubber stamp" agency interpretations that are inconsistent with statutory mandate).

However, to the extent this Court determines that any agency interpretation of the Treasury Amendment is relevant, it should look to the long-standing views of the Treasury Department.[15] The Treasury Department (as well as the SEC) have asserted, consistent with Petitioners here, that the Treasury Amendment exempts off-exchange foreign currency options from regulation under the CEA. *See* Amicus Curiae Brief of the United States in *Salomon Forex v. Tauber*, No. 92-1406 (4th Cir. 1992), Pet.

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[15] The CFTC itself previously seems to have recognized the proper scope of the Treasury Amendment, when it cited the 1974 Senate Report to confirm that "regulation by the [CFTC] of transactions in the specified financial instruments . . . is unnecessary, *unless executed on a formally organized futures exchange.*" *SEC-CFTC Jurisdictional Correspondence*, [1975-77 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,117 (CFTC Staff Response, Dec. 3, 1975), at 20,834 n.13, emphasis added). Here, however, the CFTC continues its unsuccessful campaign (as in its *amicus* submission in *Salomon Forex*) to reinterpret the Treasury Amendment – since it is "pressing for greater regulation of transactions in foreign currencies." *Salomon Forex*, 8 F.3d at 974.

App. 10d; Solicitor General Opp. at 12-13. As explained by the United States in *Salomon Forex*:

> A smoothly functioning foreign currency market, with a wide range of participants, is essential to international trade and investment flows. However, a narrowed interpretation of the Treasury Amendment could put into question outstanding transactions, as well as inhibit risk-reducing improvements, such as clearing-house operations, in the foreign currency market. The Treasury, as the agency charged with managing the international financial policy of the United States, has an important interest in preventing the legal uncertainty a narrow interpretation of the Treasury Amendment would introduce into this enormous market, which is an essential component of the international economic system.

Pet. App. 10d.

Significantly, the United States previously has taken the position before this Court that the reasoning in *Chicago Board of Trade* – which underlies both *American Board of Trade* and the decision below – should be rejected.[16] *See*

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[16] The United States has not taken a position on the proper disposition of this case on the merits. The Solicitor General was not involved in the proceedings in the lower courts (since the CFTC has independent litigating authority there), nor did he express a view on the merits in his brief in opposition to granting the writ of certiorari. However, if the United States reverses the position stated in the petition for a writ of certiorari in *Chicago Board of Trade* and the amicus brief in *Salomon Forex*, then the position of the United States would not be entitled to deference. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451

Amicus Curiae Brief of the United States in *Salomon Forex*, Pet. App. 23d:

> In petitioning the Supreme Court for review of the Seventh Circuit's decision, the Solicitor General asserted that the Court incorrectly interpreted the Treasury Amendment, stating that options on government securities were within the Amendment's "transactions in" language.

Furthermore, the United States also noted that *Chicago Board of Trade* and *American Board of Trade* "cannot be reconciled with the statutory purpose of the Amendment"; instead, "options on government securities were within the Amendment's 'transactions in' language." Pet. App. 22d-23d. Moreover, the United States in *Salomon Forex* acknowledged that the district court had "correctly interpreted the Treasury Amendment," by holding that the "transactions in foreign currency" reference in the Treasury Amendment "plainly and unambiguously means any transaction, without limitation as to the participants involved, in which foreign currency is the commodity or subject matter." Pet. App. 16d. Additionally, the United States pointed out that such an interpretation of CEA regulation would result in a situation where "market efficiency would be reduced and innovation in the development of new mechanisms would be inhibited,

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U.S. 259, 273 (1981) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") *Federal Election Comm'n*, 454 U.S. at 27 (the "consistency of an agency's reasoning" is a factor that bears upon the deference that is due).

all with the tendency to increase the cost of financing government debt." *Salomon Forex*, 8 F.3d at 974.

Thus, the plain language of the Treasury Amendment, the purpose underlying it, and the long-standing view of the Treasury Department construing it, all demonstrate that "transactions in foreign currency" reach beyond transactions in the commodity itself to include *all* transactions in which foreign currency is the subject matter, including options. Accordingly, all off-exchange "transactions in foreign currency," such as the foreign currency options at issue in this case, are exempted from regulation under the CEA.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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(9)

No. 95-1181

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,
PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION

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QUESTION PRESENTED

Whether the "Treasury Amendment" to the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, which provides in pertinent part that "[n]othing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency * * * unless such transactions involve the sale thereof for future delivery conducted on a board of trade," 7 U.S.C. 2(ii), excludes off-exchange foreign currency options from CEA regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 58 F.3d 50. The order and memorandum of the district court (Pet. App. 1b-6b) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A petition for rehearing was denied on August 4, 1995 (Pet. App. 1c-2c). On December 12, 1995, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including January 23, 1996. The petition was

filed on that date, and it was granted on May 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, provides as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. 2(ii).

7 U.S.C. 2 in its entirety, as well as 7 U.S.C. 5 and 6c, are reproduced at App. A, *infra*, 1a-9a.

STATEMENT

The Commodity Futures Trading Commission (CFTC) brought suit in the United States District Court for the Southern District of New York against petitioners William C. Dunn and Delta Consultants, Inc. (as well as two additional corporate defendants), charging them with fraud in connection with commodity option transactions, in violation of the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and associated regulations. See 7 U.S.C. 6c(b); 17 C.F.R. 32.9. The district court granted the CFTC's motion for the appointment of a temporary receiver, Pet. App. 1b-6b, and petitioners sought apellate review

under 28 U.S.C. 1292(a)(2). The court of appeals affirmed the district court's order, rejecting petitioners' argument that the Treasury Amendment to the CEA, 7 U.S.C. 2(ii), deprives the CFTC of jurisdiction over transactions in foreign currency options that are not conducted on an organized exchange. Pet. App. 1a-7a.

A. The History Of Commodity Futures And Options Regulation

This Court has recounted the history of commodity futures regulation in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 355-367 (1982). The concept of a "commodity future" originated in the needs of farmers and their customers to fix the price of agricultural products before harvest and delivery. Those parties found it useful to engage in the sale of a commodity before it was ready for market by agreeing to terms for future delivery at a specified price. See 456 U.S. at 357-358. The growth of that practice led to the organization of commodity exchanges, which employ standard contracts and rules for trading. The exchanges not only provide price discovery and hedging functions for commodity producers and processors, but they also provide speculative opportunities for investors. *Id.* at 359-360. See also S. Rep. No. 1131, 93d Cong., 2d Sess. 11-14 (1974).

1. *Initial regulation of futures and options trading.* In 1848, when the Chicago Board of Trade was founded as the first American commodity exchange, traders engaged primarily in the purchase and sale of "futures" contracts, which obligate the seller to deliver a commodity, and the buyer to pay for it, on a specified future date. See Jerry W. Markham, *The*

History of Commodity Futures Trading and Its Regulation 4 (1987). By 1865, commodities traders were also engaged in the purchase and sale of "options" contracts (also known as "privileges," "indemnities," "puts," and "calls"), which granted the option holder the unilateral temporary right, but not the obligation, to purchase or sell a commodity at a specified price. *Id.* at 8-9. Although futures and options bear important similarities, they have always been recognized as distinctly different transactions, both as a matter of law and as a matter of practical consequence. See, *e.g.*, 1 Timothy J. Snider, *Regulation of the Commodities Futures and Options Markets* §§ 7.01-7.02, 10.11-10.13 (2d ed. 1995); Robert C. Lower, *The Regulation of Commodity Options*, 1978 Duke L.J. 1095, 1096 nn.2 & 3; see also pages 37-39, *infra*.

During the late 19th and early 20th centuries, farmers and other members of the general public came to question the integrity of the commodity markets. They complained that speculation in commodity futures and options resulted in devastating price swings, particularly when exchange participants attempted to "corner" the market in particular commodities. See Markham, *supra*, at 5-7, 10-11. They also criticized certain off-exchange practices, including the operation of "bucket shops," which enticed individuals to place bets on commodity price movements. *Id.* at 9-10, 11. Proponents of reform frequently identified options trading as a particular source of abuse. Many farmers and grain dealers considered options as simply gambling contracts that were unnecessary to the functioning of the marketplace. 1 Snider, *supra*, at § 7.03; Markham, *supra*, at 8-9; Lower, *supra*, 1978 Duke L.J. at 1097-1101.

The outbreak of World War I led to rampant commodity speculation and ultimately prompted Congress to enact the Futures Trading Act of 1921, ch. 86, 42 Stat. 187. See Markham, *supra*, at 10-12. Congress attempted to curb price manipulation and bucketing by imposing a prohibitive tax on grain futures unless they were traded on government licensed boards of trade, known as "contract market[s]," that met prescribed governmental standards. § 4, 42 Stat. 187. In addition, Congress proposed a prohibitive tax on *all* grain options. § 3, 42 Stat. 187. That provision reflected the sentiment, expressed in congressional hearings, that options were simply "gambling" transactions. See, *e.g.*, *Future Trading In Grain: Hearings on H.R. 5676 Before the Senate Comm. on Agriculture and Forestry*, 67th Cong., 1st Sess. 60-63, 180 (1921); see also *id.* at 84 (noting that the "national trades" favored prohibiting privileges).

This Court ruled that the provisions of the Futures Act of 1921 that placed a tax on futures transactions conducted outside of a contract market were an unconstitutional exercise of the taxing power. See *Hill* v. *Wallace*, 259 U.S. 44 (1922). In response, Congress enacted the Grain Futures Act of 1922, ch. 369, 42 Stat. 998, which relied on the Commerce Clause to prohibit futures transactions outside of a licensed contract market. The Court rejected a challenge to the constitutionality of that legislation, *Board of Trade of Chicago* v. *Olsen*, 262 U.S. 1 (1923), and the federal government began to conduct regulatory oversight of the futures markets, Markham, *supra*, at 14-21. Questions remained, however, over the constitutionality of the surviving provisions of the Futures Trading Act of 1921, not at issue in *Hill*, that placed a prohibitory tax on options. See 259 U.S. at

71. The Court eventually invalidated the options tax. *Trusler* v. *Crooks*, 269 U.S. 475 (1926). As a result, trading in options resumed. See Markham, *supra*, at 20; Lower, *supra*, 1978 Duke L.J. at 1100-1101.

2. *The Commodity Exchange Act of 1936.* Following the stock market crash of 1929, the market for wheat and other grains began to weaken. In 1932, speculative trading led to a calamitous collapse in wheat prices, and President Roosevelt called for expanded regulatory controls over the commodity markets. See 1 Snider, *supra*, at § 7.03; Markam, *supra*, at 22-25; Lower, *supra*, 1978 Duke L.J. at 1101. In response, Congress enacted the Commodity Exchange Act of 1936 (CEA), ch. 545, 49 Stat. 1491. Congress adopted the CEA to "insure fair practice and honest dealing on the commodity exchanges, and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." H.R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935).

Congress enacted the CEA as an amended version of the Grain Futures Act. See § 1, 49 Stat. 1491. Congress defined the term "commodity" to include specifically enumerated agricultural products, including grains, butter, eggs, potatoes, rice, and cotton, see §§ 2-3, 49 Stat. 1491, and it continued to allow trading of futures contracts in those commodities in the controlled environment of a federally-designated "contract market," see §§ 4-5, 49 Stat. 1492. Congress subjected those markets, however, to more exacting registration and regulatory requirements, which were administered by the Department of Agriculture's Commodity Exchange Authority. Congress also prohibited specific trading practices that were

believed to contribute to excessive speculation, price instability, market manipulation, or fraud. See §§ 4-9, 49 Stat. 1492-1501; see generally Markham, *supra*, at 27-34.

Congress specifically outlawed trading in options. See § 5, 49 Stat. 1494 (adding Section 4c). Many persons, including Members of Congress, believed that options trading encouraged inappropriate speculation and played a significant role in the wheat market's collapse. See Lower, *supra*, 1978 Duke L.J. at 1101 & n.23; see also, *e.g.*, 78 Cong. Rec. 10,449 (1934) (Rep. Gilchrist) (denouncing options as "purely gambling transactions" that "prevent the producer from getting an honest price"). In the face of concerns that options "lent themselves to cheating or fraudulent practices," 80 Cong. Rec. 6162 (1936), Congress enacted an outright ban on the trading of options in the enumerated commodities. That ban effectively brought an end to commodity option trading in the United States for the next 35 years. See 1 Snider, *supra*, at § 7.03; Lower, *supra*, 1978 Duke L.J. at 1098, 1101-1102.

3. *The Commodity Futures Trading Commission Act of 1974.* During the decades following the enactment of the CEA, the commodity markets grew in both size and complexity as world-wide trade developed in new and previously unregulated commodities. See, *e.g.*, Markham, *supra*, at 35-59. Congress responded to the evolution in the commodity markets in 1968 by extending the coverage of the CEA. See Act of Feb. 19, 1968, Pub. L. No. 90-258, 82 Stat. 26. But six years later, Congress concluded that more significant changes were needed, and it enacted the Commodity Futures Trading Commission Act of 1974

(CFTC Act), Pub. L. No. 93-463, 88 Stat. 1389. See S. Rep. No. 1131, *supra*, at 18-19. The CFTC Act comprehensively overhauled and expanded the CEA, which is codified as amended at 7 U.S.C. 1 *et seq.* The CFTC Act also created the CFTC as a new federal agency devoted to commodity futures and options regulation. See generally Markham, *supra*, at 60-72. Two general considerations of the CFTC Act are particularly pertinent to this case.

First, Congress greatly expanded the scope of federal commodity regulation. Since the enactment of the CEA in 1936, world markets had developed for new commodities, such as coffee, sugar, and precious metals, which were not regulated under the CEA. In the face of that development, Congress redefined the term "commodity" to include not only previously enumerated commodities, but also virtually "all other goods and articles * * * and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. 1a(3). Congress also gave the CFTC correspondingly broad regulatory power over trading in those commodities. Subject to certain important exceptions (including the Treasury Amendment, discussed below), Congress gave the CFTC "exclusive jurisdiction" with respect to "accounts, agreements * * *, and transactions involving contracts of sale of a commodity for future delivery." 7 U.S.C. 2(i). See generally S. Rep. No. 1131, *supra*, at 23-24, 31; H.R. Conf. Rep. No. 1383, 93d Cong., 2d Sess. 35-36 (1974).

Second, Congress retained the CEA's ban on trading of options involving the previously-regulated agricultural commodities, 7 U.S.C. 6c(a)(B) (1976), but it left open the possibility of an options market in

the new commodities. Congress acted cautiously in light of the American experience during the early 1970s, when several new forms of unregulated options in those commodities (which were known as "London," "naked," and "dealer" options) first appeared. See Lower, *supra*, 1978 Duke L.J. at 1102-1109. Although some of those options provided legitimate investment opportunities, others resulted in largescale losses and highly publicized instances of fraud. *Ibid.* Congress consequently concluded that options involving newly regulated commodities should be allowed only in accordance with CFTC rules, regulations, and orders. 7 U.S.C. 6c(b) (1976). See generally S. Rep. No. 1131, *supra*, at 26, 41-42; H.R. Conf. Rep. No. 1383, *supra*, at 40. Congress gave the CFTC authority to permit or prohibit options trading in the newly regulated commodities. See 1 Snider, *supra*, at §§ 7.03-7.04; Markham, *supra*, at 66; Lower, *supra*, 1978 Duke L.J. at 1111.

4. *The CFTC's regulation of options.* Upon commencing operations in 1975, the CFTC began to examine whether option transactions in "new" commodities should be permitted. The CFTC initially promulgated interim rules that allowed the off-exchange offer and sale of such options under certain circumstances. See 41 Fed. Reg. 7774 (1976); *id.* at 44,560; *id.* at 51,808. Those rules did not allow trading of options on United States exchanges. *Id.* at 51,808. See 1 Snider, *supra*, at § 7.04.

By 1978, the Commission concluded that "the offer and sale of commodity options has for some time been and remains permeated with fraud and other illegal or unsound practices notwithstanding a substantial investment of the Commission's resources in

attempting to regulate rather than prohibit option trading." 43 Fed. Reg. 16,153, 16,155 (1978). It therefore adopted regulations prohibiting the domestic sale of most commodity options after June 1, 1978. *Id.* at 16,161; 17 C.F.R. 32.11 (1982). The regulations did, however, permit sales to continue in certain "trade options," which are purchased for commercial purposes relating to the commodity and are not marketed to the general public. See 17 C.F.R. 32.4(a) and 32.11(b) (1982); 1 Snider, *supra*, at § 7.14 (describing trade options). The Commission also permitted existing companies that dealt in the actual commodity to continue marketing of so-called "dealer options" under detailed conditions. 43 Fed. Reg. 52,467 (1978). See 1 Snider, *supra*, at §§ 7.05-7.06, 7.14.

Congress, which was then considering other amendments to the CEA, endorsed the CFTC's assessment by adopting a statutory ban on the marketing of options in the newly regulated non-agricultural commodities. See Futures Trading Act of 1978, Pub. L. No. 95-405, § 3, 92 Stat. 867. Like the CFTC, Congress included an exception for dealer and trade options, and it authorized the CFTC to develop a program, subject to congressional approval, for exchange-traded options. *Ibid.*, codified at 7 U.S.C. 6c(c)-(e) (Supp. II 1978); see S. Rep. No. 850, 95th Cong., 2d Sess. 14 (1978).

In 1981, the CFTC announced a three year "pilot program" for trading of options on futures contracts on exchanges designated as contract markets. 46 Fed. Reg. 54,570 (1981). Congress authorized the CFTC to extend the pilot program to agricultural commodities, see Futures Trading Act of 1982, Pub. L. No. 97-444, Tit. II § 206, 96 Stat. 2301, and the CFTC correspondingly expanded the program, see 47 Fed. Reg. 56,996 (1982). In 1984, the CFTC increased the number of options a particular contract market could offer. 49 Fed. Reg. 33,641 (1984). The CFTC ended the pilot program two years later by adopting final regulations allowing exchange-traded commodity options. 51 Fed. Reg. 27,529 (1986). See Futures Trading Act of 1986, Pub. L. No. 99-641, § 102, 100 Stat. 3557; see generally 1 Snider, *supra*, at §§ 3.01-3.02.

Since that time, Congress has made other revisions to the CEA. See Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590; CFTC Reauthorization Act of 1995, Pub. L. No. 104-9, 109 Stat. 154. The 1992 Amendments are particularly significant because they grant the CFTC broad exemptive authority, similar to that contained in Section 6c respecting options, respecting other transactions that are subject to CEA regulation. See § 502(a)(2), 106 Stat. 3629; 7 U.S.C. 6(c) and (d). That exemption authority gives the CFTC additional flexibility to exempt appropriate agreements, contracts, and transactions from CEA requirements. See, *e.g.*, 17 C.F.R. 35.2 (the so-called swaps exemption).

B. Regulation Of Foreign Currency Futures And Options

At the time that Congress was considering the CFTC Act of 1974, an off-exchange market had developed for trade in foreign currency futures. See S. Rep. No. 1131, *supra*, at 94 (Appendix III); City of New York Bar Ass'n Comm. on Futures Regulation, *The Evolving Regulatory Framework For Foreign Currency Trading* (1986). That market grew

out of privately negotiated transactions between commercial banks, multi-national corporations, and sophisticated investors who entered into those transactions for both commercial hedging and speculative purposes. *Id.* at 3. Congress responded to the existence of that market by including within the CFTC Act a provision currently known as the Treasury Amendment to the CEA.

1. *The Treasury Amendment.* The Treasury Amendment originated in concerns expressed in a July 30, 1974, letter from the Department of the Treasury's Acting General Counsel to the Chairman of the Senate Committee on Agriculture and Forestry. See S. Rep. No. 1131, *supra*, at 49-51 (reproduced at App. B, *infra*, 10a-14a). The Acting General Counsel warned that, as a result of the proposal to expand the CEA definition of the term "commodity" through the CFTC Act, financial instruments such as foreign currency futures and government securities futures, which were then traded among banks and other sophisticated institutions, could become subject to new and unnecessary regulation. *Ibid.*

The Treasury Department suggested that the pending legislation include additional language that would expressly exclude from regulation transactions in foreign currency and other specified financial instruments. See S. Rep. No. 1131, *supra*, at 50-51. Congress responded by incorporating the Department's proposed statutory language, except as to "puts and calls on securities." The Treasury Amendment provides in pertinent part:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, * * * unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. 2(ii). At the time that the Treasury Department proposed the Treasury Amendment, it made specific reference to the foreign currency futures market. See S. Rep. No. 1131, *supra*, at 49-51. But the Treasury Department made no mention of any market in foreign currency options. That market did not develop until some time later in the 1970s, when banks began trading foreign currency options on a commercial scale. See Comm. on Futures Regulation, *supra*, at 18, 23.

2. *The SEC/CFTC Accord.* Following the enactment of the CFTC Act, both national securities exchanges and futures exchanges sought to market and trade in new financial products, which led to questions concerning the CFTC's jurisdiction. Of particular relevance here, the Chicago Board of Trade and the Securities and Exchange Commission (SEC) became involved in a dispute over whether the SEC or the CFTC had jurisdiction to regulate options in mortgage-backed debt securities guaranteed by the Government National Mortgage Association (GNMA). See *Board of Trade of Chicago* v. *SEC*, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982).

The *Board of Trade* litigation was ultimately rendered moot by an inter-agency agreement between the SEC and the CFTC, sometimes referred to as the "Shad/Johnson" or "SEC/CFTC" Accord, which defined with greater precision the division of regulatory authority between the SEC and the CFTC respecting options on financial instruments. See *Joint Explanatory Statement of the Commodity Futures Trading*

Commission, and the Securities and Exchange Commission, reprinted in [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,332 (Feb. 2, 1982). Of particular significance here, the legislation implementing the Accord provides that the SEC shall exercise jurisdiction over the trading of foreign currency options on United States securities exchanges, but leaves unaffected the CFTC's authority over foreign currency options traded in other markets. See Act of Oct. 13, 1982, Pub. L. No. 97-303, 96 Stat. 1409, codified at 15 U.S.C. 77(b)(1), 78c(a)(10), 78i(g), 80a-2(a)(36), and 80b-2(a)(18) (1982); Futures Trading Act of 1982, Pub. L. No. 97-444, Tit. I, § 102, 96 Stat. 2296, codified at 7 U.S.C. 6c(f) (1982). The Senate Report accompanying the latter Act states:

> The trading of options on foreign currencies will be regulated by both agencies; the SEC will regulate these options when they are traded on a national securities exchange, the CFTC will regulate them when they are traded other than on a national securities exchange.

S. Rep. No. 384, 97th Cong., 2d Sess. 22 (1982). See also H.R. Rep. No. 565, 97th Cong., 2d Sess., Pt. 1, at 39 (1982) (CFTC has jurisdiction over all "[o]ptions directly on foreign curencies"); see generally 1 Snider, *supra*, at § 10.24.

3. *The ABT and Salomon Forex Litigation.* In the late 1970s, the CFTC began to encounter situations in which unscrupulous promoters fraudulently marketed foreign currency futures and options to the general public. In 1979, the CFTC brought an enforcement action against an entity organized by Arthur Economou called the American Board of

Trade (ABT). *CFTC* v. *American Board of Trade (ABT)*, 473 F. Supp. 1177 (S.D.N.Y. 1979), aff'd, 803 F.2d 1242 (2d Cir. 1986). ABT claimed to provide "an exchange and marketplace" for certain commodity options transactions, including foreign currency options. 803 F.2d at 1244. The CFTC charged that those unlicensed activities were unlawful under the CEA. Among its defenses, ABT asserted that the Treasury Amendment excluded its foreign currency option transactions from regulation under the CEA.

The district court rejected ABT's arguments, entered a judgment enjoining ABT from engaging in options transactions, and ordered ABT to reimburse injured customers. 803 F.2d at 1244-1246. The Second Circuit affirmed the district court's decision, specifically rejecting ABT's Treasury Amendment defense. The court of appeals agreed with the district court that "an option to buy or sell foreign currency is not a purchase or sale of the currency itself and hence is not a transaction 'in' that currency, but at most is one that relates to the currency." 803 F.2d at 1248 (citing 473 F. Supp. at 1182). Having found that ABT's options were not "transactions in foreign currency" for purposes of the Treasury Amendment, the court of appeals discerned no need to determine whether ABT's transactions fell within the Treasury Amendment's "board of trade" proviso. *Ibid.*

Several years later, litigation arose that again raised questions over the meaning of the Treasury Amendment. *Salomon Forex, Inc.* v. *Tauber*, 795 F. Supp. 768 (E.D. Va. 1992), aff'd, 8 F.3d 966 (4th Cir. 1993), cert. denied, 114 S. Ct. 1540 (1994). The *Tauber* litigation grew out of a private debt collection dispute. A foreign currency brokerage company, Salomon Forex, brought a diversity suit in

federal district court to enforce a trading debt against a sophisticated foreign currency trader, Dr. Laszlo Tauber. The trader principally argued that the debts were unenforceable because they arose from off-exchange futures and options transactions that were not conducted in compliance with the CEA. He contended that the Treasury Amendment exempted from CEA regulation only "spot" and "cash forward" foreign currency transactions, in which the parties anticipate actual delivery of the commodity. See 1 Snider, *supra*, at §§ 9.01, 10.04, 10.16.

The district court ruled that the trading debts were enforceable because the Treasury Amendment's reference to "transactions in foreign currency" exempted off-exchange foreign currency futures and options from CEA regulation. See 795 F. Supp. at 773. The Fourth Circuit affirmed, reasoning that the "broad and unqualified" phrase "transactions in foreign currency" reaches "*all* transactions in which foreign currencies are the subject matter, including options." 8 F.3d at 975. The Fourth Circuit distinguished the Second Circuit's decision in *ABT* on the basis that the *ABT* case involved a foreign currency options transaction conducted by "unsophisticated private individuals buying on an organized exchange." *Id.* at 977-978.

C. The Proceedings Below

On April 8, 1994, the CFTC filed a complaint in federal district court charging petitioners (as well as two additional corporate defendants, Delta Options Ltd. and Nopkine Co., Ltd.) with fraud in connection with commodity option transactions, in violation of 7 U.S.C. 6c(b) and 17 C.F.R. 32.9. The complaint alleged that Dunn and each corporation had

made misrepresentations to existing and prospective customers concerning the likelihood of profit and loss associated with trading commodity options and the true status of their invested funds. The options identified in the complaint consisted of various foreign currencies (Japanese yen, Australian dollars, German marks, British pounds, Canadian dollars, and Swiss francs) that are subject to futures trading on United States contract markets. The complaint also charged Dunn individually with liability for the corporations' fraud as an aider and abettor, in violation of 7 U.S.C. 13c(a), and as a controlling person, under 7 U.S.C. 13c(b). J.A. 4-14.

1. *The district court proceedings.* The CFTC moved the district court to appoint a temporary equity receiver to locate, preserve, and control all four defendants' property for the benefit of customers. That request was based primarily upon the serious allegations of fraudulent conduct, the apparent disappearance of more than $180 million of customers' funds, and the defendants' apparent transfer of a large sum of money from the United States to Switzerland in late 1993. On June 23, 1994, the district court granted the request for appointment of a temporary receiver. Pet. App. 1b-4b. In a separate memorandum, the district court concluded that its jurisdiction to enter the receivership was proper under *ABT*, *supra*. Pet. App. 5b-6b.

2. *The court of appeals' decision.* The court of appeals affirmed the district court's appointment of a temporary receiver. Pet. App. 1a-7a. The court first described the allegations leading to the CFTC's receivership request. The court explained that some of the defendants solicited investments from a number of individuals, partnerships, and companies who

were told that Delta Options would use the money to execute investment strategies involving the purchase and sale of puts and calls on various foreign currencies. The defendants then used those investments to trade options in the "off-exchange" market and create "exotic" positions involving foreign currencies, bearing names such as "strangles" and "boxes." Pet. App. 2a.

The court next described the elements of the fraudulent scheme as set forth in CFTC-submitted affidavits, none of which had been disputed in the district court. Those affidavits charged that Dunn and his agents had disseminated false information concerning the risks and rewards of currency trading and of investing with defendants. The affidavits also charged that investors were deceived about the success of defendants' trading and the status of investors' accounts. Pet. App. 2a. Moreover, some investors claimed that the defendants' misleading reports summarizing the putative market value of the investors' particular positions had caused them to "roll-over" their positions instead of cashing them out. *Id.* at 2a-3a.

The court found from the affidavits that the scheme began to unravel in the second half of 1993. Pet. App. 3a. Certain investors received communications in November and December of that year disclosing that the defendants had encountered massive trading losses and were unable to repay the investors' money. *Ibid.* Based upon that record, the appeals court concluded that

> whatever their original intent, defendants became engaged in an old-fashioned "Ponzi" scheme, accompanied by exotic financial vocabulary. The weekly print-outs suggested large returns, which convinced most investors to "roll over" their funds. So long as these funds and money from new investors exceeded losses, any investor who wished to "cash out" could be paid off. The losses, however, were too great to be offset by "roll-overs" or new money, and much of the investors' money has disappeared.

Id. at 4a. The court concluded that the CFTC's evidentiary proffer "sufficiently demonstrated that defendants deceived investors and caused investors to receive false reports" in violation of 7 U.S.C. 6c(b), and that Dunn was personally liable as an aider and abettor and a controlling person with respect to the violations at issue. Pet. App. 4a-5a.

The court then addressed whether trading in off-exchange foreign currency options is excluded from the CFTC's jurisdiction by the Treasury Amendment to the CEA, 7 U.S.C. 2(ii), and, in particular, whether the phrase "transactions in foreign currency" contained within that Amendment includes foreign currency options. Pet. App. 5a. The court concluded that its 1986 decision in *ABT* controlled that issue. As noted above, the court of appeals concluded in *ABT* that the purchase or sale of an option did not constitute a "transaction in foreign currency" and that the defendants' conduct was therefore not subject to the Treasury Amendment exclusion. *ABT*, 803 F.2d at 1248. The court of appeals acknowledged that the *ABT* panel could have reached the same result through a different rationale by concluding that the instruments at issue in *ABT* were traded on an exchange and were therefore subject to CEA regulation in any event by virtue of the "board of trade" clause of the Treasury Amendment. The court declined, however, to adopt that rationale, stat-

ing that "a later panel may not disregard the reasoning of a decision because an entirely different line of reasoning was available." Pet. App. 6a. The court of appeals was not persuaded by the arguments of various banks, participating as *amici curiae*, that a number of potentially detrimental effects could result from a holding that off-exchange foreign currency options fall within CEA jurisdiction. The court noted the CFTC's suggestion that those effects were "to a degree deflected" by the CFTC's trade option exemption from the CEA. *Id.* at 7a.

SUMMARY OF ARGUMENT

Petitioners contend that the CFTC lacks authority to bring this enforcement action because the Treasury Amendment precludes CEA regulation of all off-exchange foreign currency transactions, including the purchase and sale of foreign currency options. The scope of the Treasury Amendment has been a matter of some controversy, and the Department of the Treasury and the CFTC have expressed differing views on the issue, which involves important considerations of financial and regulatory policy. But at bottom, the issue before the Court is one of statutory construction, and petitioners' interpretation of the Act is, in the end, unpersuasive. By its terms, the Treasury Amendment excludes foreign currency futures from CEA regulation, provided that the futures transactions are conducted outside of a board of trade. The Treasury Amendment, however, does not extend that exclusion to foreign currency options.

A. Petitioners correctly acknowledge that a statute's text must ordinarily be regarded as the conclusive guide to the statute's meaning. See, *e.g.*, *Reves*

v. *Ernst & Young*, 507 U.S. 170, 177 (1993). Petitioners are mistaken, however, in their understanding of the Treasury Amendment's language. The Treasury Amendment, which employs the specialized terminology of the CEA, excludes from CEA regulation "transactions in foreign currency." 7 U.S.C. 2(ii). Petitioners' analysis, which rests on a selection of dictionary definitions of the words "transaction" and "in" to support their position, is inadequate because it fails to take into account the context in which those words are used here. See, *e.g.*, *Reno* v. *Koray*, 115 S. Ct. 2021, 2025 (1995).

The court of appeals correctly recognized that the Treasury Amendment's reference to "transactions in foreign currency" conveys a specific intention. The Treasury Amendment applies to the purchase and sale of foreign currency futures contracts, because those contracts legally obligate a buyer to purchase or sell the foreign currency at some future date and are therefore transactions "in" that commodity. But it does not exclude the purchase or sale of foreign currency option contracts, because those transactions result only in the grant of unilateral *rights* to buy or sell foreign currency at some future date and are therefore not transactions "in" the commodity itself. See Pet. App. 5a-6a; *CFTC* v. *American Board of Trade*, 803 F.2d 1242, 1248-1249 (2d Cir. 1986).

The court of appeals' interpretation of the Treasury Amendment is supported by other textual indicia of congressional intent. The CEA's provisions are quite consistent in either referring to options expressly, or using more encompassing terminology than transactions "in" a commodity, when referring to commodity options. For example, Congress dis-

tinguished between transactions "in" and transactions "involving" commodities in other sections of the CEA. The CEA's exclusive jurisdiction provision, 7 U.S.C. 2(i), and its general options provision, 7 U.S.C. 6c, both describe commodity options as transactions "involving"—rather than transactions "in"—the commodity. See, *e.g.*, *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994).

Congress's use of terminology that distinguishes between transactions "in" and transactions "involving" a commodity should be respected. It reflects Congress's long-standing practice, reflected in 7 U.S.C. 6c, of regulating commodity options differently, and often more strictly, than commodity futures. From the inception of the CEA, Congress authorized trade in commodity futures, but it imposed a corresponding prohibition on the purchase and sale of commodity options. Congress preserved a regulatory distinction between commodity futures and commodity options when it enacted the CFTC Act, which also contained the Treasury Amendment. Hence, it is hardly surprising that Congress preserved a regulatory distinction between foreign currency futures and options in the Treasury Amendment.

The court's interpretation finds additional support in the Treasury Amendment's "board of trade" proviso. Although the Treasury Amendment generally excludes specific transactions from CEA regulation, its board of trade proviso sweeps back within the CEA's coverage those futures transactions that are conducted on a board of trade. But the board of trade proviso expressly applies only to futures transactions. Congress would have had no reason to limit the

board of trade proviso in that way unless it intended that only foreign currency futures—and not foreign currency options—would be excluded from regulation.

The court of appeals' interpretation finds additional textual support in a subsection of the general options provision, 7 U.S.C. 6c(f), which indicates that the CFTC has authority to regulate foreign currency options conducted outside of national securities exchanges. Congress added that provision in 1982 as part of its legislation that implemented the SEC/CFTC Jurisdictional Accord. Congress, which does not ordinarily amend statutes with surplusage, would have had no reason to include that provision if the Treasury Amendment already excluded foreign currency options from CFTC regulation. Cf. *Stone* v. *INS*, 115 S. Ct. 1537, 1545 (1995).

B. Petitioners acknowledge that when a statute speaks clearly to the matter at issue there is no need to go further. See *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2147 (1995). They nevertheless argue that their construction is consistent with Congress's purposes in enacting the Treasury Amendment. Those arguments, however, are without merit. Petitioners assert that futures and options are functionally similar and that the Treasury Amendment should be interpreted to treat them in the same way. But as we have noted, Congress has consistently regulated options differently than futures, and its expressed intention to do so is the law. See *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990). Contrary to petitioners' contentions, the Treasury Amendment draws a clear and manageable line between the treatment of futures and options. In addition, the legislative history confirms

that the text of the Treasury Amendment expresses Congress's intent. And even if there were doubts respecting Congress's intent, this Court's practice would be to resolve those doubts in favor of a narrow construction of the Treasury Amendment's exclusion. See, *e.g.*, *City of Edmonds* v. *Oxford House, Inc.*, 115 S. Ct. 1776, 1780 (1995).

C. Petitioners also attempt to find support for their position in the fact that the Treasury Amendment has at times raised questions among federal agencies concerning the scope of their respective jurisdictions. That factor, however, should not affect the Court's inquiry. The only question before this Court is the scope of the Treasury Amendment's regulatory exclusion of "transactions in foreign currency." The court of appeals properly resolved that question on the basis of the statutory text. See, *e.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). As petitioners' amici note, the interbank foreign currency market may have a legitimate policy need for a broader regulatory exemption than the Treasury Amendment provides. But that is not a question for this Court.

ARGUMENT

THE TREASURY AMENDMENT DOES NOT EXCLUDE FOREIGN CURRENCY OPTIONS FROM REGULATION UNDER THE COMMODITY EXCHANGE ACT

INTRODUCTION

Congress enacted the Treasury Amendment to exclude an important class of financial transactions from regulation under the newly expanded version of the CEA. In recent years, the scope of the Treasury Amendment's exclusion of "transactions in foreign

currency" has produced considerable controversy. The Department of the Treasury, which first proposed the exclusion, has taken the view that the Treasury Amendment excludes both foreign currency futures and foreign currency options from regulation under the CEA, provided that those transactions are conducted outside of a board of trade. By contrast, the CFTC, which is the agency responsible for administering the CEA, has concluded that the Treasury Amendment does not exempt foreign currency options from CEA regulation.

The Treasury Department's view rests in part on important financial policy concerns. The Treasury Department, which is responsible for managing the international financial policy of the United States, urged Congress to enact the Treasury Amendment to promote an efficient off-exchange market in foreign currency and government securities for the benefit of banks and other sophisticated and informed institutions. See S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974) (Letter of Donald Ritger Acting General Counsel, reproduced at App. B, *infra*, 10a-14a). The Department believes that because foreign currency futures and foreign currency options serve the same or similar purposes in the off-exchange market, they should enjoy the same exemption from CEA regulation. It is concerned that excessive domestic regulation may drive that market to overseas financial centers that provide a more hospitable regulatory environment. In those respects, the Treasury Department shares some of the views expressed by the petitioners' amici. See Amicus Br. of the Foreign Exchange Committee *et al.*; Amicus Br. of Crédit Lyonnais *et al.*

The CFTC also has an important policy perspective on the issue. The CFTC points out that unscrupulous

promoters have frequently employed commodity options as a device to take advantage of unsuspecting investors. See 1 Timothy J. Snider, *Regulation of the Commodities Futures and Options Markets* § 7.03 (2d ed. 1995) (describing abusive practices, including the infamous Goldstein-Samuelson commodity options scandal); Jerry W. Markham, *The History of Commodity Futures Trading and its Regulation* 57 (1987) (same); Robert C. Lower, *The Regulation of Commodity Options*, 1978 Duke L.J. 1102-1109 (same). In the CFTC's view, and as illustrated by the allegations in this case, the offer and sale of foreign currency options raises a similar potential for abusive or fraudulent practices. See J.A. 2-19 (Complaint).

Although there are important policy considerations on either side of the issue, the issue before this Court is ultimately one of statutory construction. The Court must "apply the statute as Congress wrote it" unless "doing so would frustrate Congress's clear intention or yield patent absurdity." *Hubbard* v. *United States*, 115 S. Ct. 1754, 1759 (1995). Approached from that perspective, petitioners' argument is unpersuasive. The Treasury Amendment excludes foreign currency futures contracts from CEA regulation, provided that those transactions are conducted outside of a board of trade. But the Treasury Amendment's precise terms do not extend that exclusion to foreign currency options. The CFTC has the power to exclude foreign currency option transactions from CEA regulation, and it may find that it is appropriate to exempt those transactions that are of concern to the Treasury Department and the various amici that have filed briefs in support of petitioners. But the court of appeals correctly concluded that the Treasury

Amendment does not provide an automatic exemption, and that court's decision should therefore be affirmed.

A. The Court Of Appeals Correctly Concluded That The Express Terms Of The Treasury Amendment Exclude Foreign Currency Futures, But Not Foreign Currency Options, From CEA Regulation

Petitioners correctly recognize that the principal source for determining a statute's meaning is the language of the statute itself, which must "ordinarily be regarded as conclusive." Pet. Br. 10. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 177 (1993); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). They properly note that the Court's task "is to apply the text, not to improve upon it." Pet. 10. See *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989); see also *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). But petitioners and their amici go astray in the application of those familiar principles. Specifically, they fail to construe the Treasury Amendment in light of the full scope and import of the CEA's language.

1. Petitioners' principal argument in support of their interpretation of the Treasury Amendment is that the "the plain language of the words 'transactions in foreign currency' means any commercial dealings involving foreign currency." Pet. Br. 10. They reach that conclusion by isolating the words "transactions" and "in" from one another and from the Treasury Amendment and the CEA as a whole, consulting a dictionary, and selecting definitions of the words "transaction" and "in" that support their position. *Id.* at 10-11 & n.8. Petitioners' approach

however, does not provide an adequate inquiry into the meaning of the Act.

As this Court has stated, "it is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Reno* v. *Koray*, 115 S. Ct. 2021, 2025 (1995); *Deal* v. *United States*, 113 S. Ct. 1993, 1996 (1993); see also *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). We therefore turn to the statutory context in which Congress used the phrase "transactions in foreign currency."

Section 2(i) of Title 7 provides the CFTC with a broad grant of authority over commodity futures. 7 U.S.C. 2(i). Section 2(i) states (subject to certain exceptions not relevant here):

> The Commission shall have exclusive jurisdiction * * * with respect to *accounts, agreements* (including any transaction which is of the character of, or is commonly known to the trade as, an "option," "privilege," "indemnity," "bid," "offer," "put," "call," "advance guaranty," or "decline guaranty"), and *transactions* involving *contracts of sale of a commodity for future delivery*, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market * * *.

7 U.S.C. 2(i) (emphasis added). By its terms, Section 2(i) gives the CFTC exclusive jurisdiction over "accounts," "agreements," and "transactions" involving futures contracts. 7 U.S.C. 2(i). That grant of jurisdiction expressly includes authority over agreements that constitute an "option" to buy or sell a futures contract. 7 U.S.C. 2(i). See 1 Snider, *supra*, at § 10.11.

Section 6c of Title 7 gives the CFTC additional (albeit nonexclusive) authority over options. 7 U.S.C. 6c. Section 6c(b) provides in pertinent part as follows:

> No person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an "option" * * *, contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

7 U.S.C. 6c(b). That provision, by its terms, is not limited to options on commodity futures contracts, but also includes options to buy or sell the "physical" commodity itself. See 1 Snider, *supra*, at § 10.12.

The Treasury Amendment—7 U.S.C. 2(ii)—is a part of that statutory framework, and it should be interpreted in light of the context provided by the foregoing provisions, all of which were enacted in 1974. See *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1990); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987). Specifically, the Treasury Amendment should be construed on the basis, demonstrated in 7 U.S.C. 2(i) and 6c, that Congress understood and knew how to express the distinction among futures contracts, options on futures contracts, and options on the physical commodity.

2. The Treasury Amendment excludes a particular class of "transactions" from CEA regulation. It provides in pertinent part:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to *transactions*

> *in foreign currency*, * * * unless *such transactions involve the sale thereof for future delivery* conducted on a *board of trade.*

7 U.S.C. 2(ii) (emphasis added). When read in light of the terminology of the CEA, those words have a definitive and circumscribed reach.

The Treasury Amendment's reference to "transactions in foreign currency" clearly excludes foreign currency futures contracts from CEA regulation unless they are conducted on a board of trade. A foreign currency futures contract legally obligates the seller to deliver a currency and the buyer to pay for it on a specified future date. See, *e.g.*, Lower, *supra*, 1978 Duke L.J. at 1096 n.3. The contract's creation of legal obligations respecting the sale and delivery of the commodity is a "transaction in" the commodity, even if (as is typically true in common experience) the transaction ultimately is extinguished before delivery by entry into an offsetting futures contract. 1 Snider, *supra*, at § 2.05. The same conclusion would hold true, a fortiori, for "spot" and "cash forward" transactions, which envision actual delivery of the commodity and are generally exempt from the CEA in any event. See 7 U.S.C. 1a(11); see also 1 Snider, *supra*, at § 9.01.

As the court of appeals recognized in *ABT* and reaffirmed in this case, however, there is a linguistic difficulty in describing an option to buy or sell foreign currency as a "transaction[] in foreign currency." 7 U.S.C. 2(ii). The purchaser of a commodity option enters into an agreement in which he pays a sum certain in return for an irrevocable offer to buy or sell the commodity at a specified price during the life of the option. See, *e.g.*, Lower, *supra*, 1978 Duke L.J. at 1096 nn.2 & 3. The purchase or sale of a commodity option is undeniably a "transaction," and it *involves* a commodity, but it is not a "transaction *in*" the commodity. Rather, it is a transaction in the *right* to buy or sell the commodity, *ibid.*—*i.e.*, the right to enter into a "transaction[] involving foreign currency" at some point in the future. The court of appeals accordingly was correct in concluding that an option to buy foreign currency is not itself a "transaction[] in foreign currency." Under the court's reasoning, the purchase or sale of a foreign currency option is not excluded from CEA regulation, although the actual exercise of an option (i.e., the actual purchase or sale of foreign currency) would be an exempt "transaction[] in foreign currency." See Pet. App. 5a-6a; *ABT*, 803 F.2d at 1248; see also *Board of Trade*, 677 F.2d at 1146 & n.17, 1154.

That construction is consistent with the other terminology used in the Treasury Amendment. For example, the Treasury Amendment expressly includes transactions in "repurchase options" among the financial transactions that are excluded from CEA regulation. See 7 U.S.C. 2(ii). That usage indicates that Congress was aware of specialized "options" terminology and suggests that Congress would have included foreign currency options as well if that was its intention.*

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* The Treasury Amendment also excludes from CEA coverage "transaction in * * * security warrants [and] security rights," unless such transactions involve sales thereof for future delivery conducted on a board of trade. The terms "security warrants" and "security rights" can be understood to include options on securities. See S. Rep. No. 1131, *supra*, at 26 (stating that the CFTC "would not have authority to regulate trading in puts and calls for securities"). The Seventh

3. The court of appeals' analysis is also consistent with the language that Congress employed in 7 U.S.C. 2(i) and 6c(b). For example, when Congress wished to include options on futures contracts within the CFTC's exclusive jurisdiction, it employed the term "agreements * * * *involving* contracts of sale of a commodity for future delivery," 7 U.S.C. 2(i), which aptly describes the nature of an option. Similarly, when Congress authorized the CFTC to regulate options trading, it made reference to "any transaction *involving* any commodity * * * which is of the character of, or is commonly known to the trade as, an 'option.'" 7 U.S.C. 6c(b). In each case, when Congress spoke to the treatment of options, it employed terminology that made its intention plain. Congress's failure to use that terminology in Section 2(ii) indicates that Congress did not intend that the Treasury Amendment would include foreign currency options within its reach. See *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Although petitioners acknowledge Sections 2(i) and 6c(b), they suggest that Congress's mere use of the word "transaction" in association with options provides a sufficient basis for concluding that the Treasury Amendment excludes options from regulation. See Pet. Br. 12-13 (citing Section 2(i)'s reference to "any transaction which is of the character of, or is commonly known to the trade as, an 'option'").

Circuit partially rejected that reading in its *Board of Trade* decision, see 677 F.2d at 1154 & n.32; cf. *id.* at 1156-1157, but the government challenged the Seventh Circuit's conclusion in its petition for a writ of certiorari in the *Board of Trade* case (No. 82-256 Pet. 21 n.21), and this Court subsequently vacated the Seventh Circuit's decision as moot, 459 U.S. 1026 (1982).

But contrary to petitioners' reasoning, the question is not whether the purchase or sale of a foreign currency option is a "transaction"—it undeniably is. Rather, the question is whether the purchase or sale of a foreign currency option is a "transaction[] *in* foreign currency." As we explain above, it is not.

The CEA's provisions are quite consistent in either referring to options expressly, or using more encompassing terminology than transactions "in" a commodity, when referring to commodity options. Petitioners' citation of 7 U.S.C. 5 is not to the contrary. See Pet. Br. 13. Section 5 states:

> Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest.

7 U.S.C. 5. That statement, which is part of Congress's legislative findings, uses the formulation of "[t]ransactions in commodities involving the sale thereof for future delivery," but it also makes clear, by specific reference, that it is describing "futures." Moreover, Section 5 specifically refers elsewhere to "options transactions," 7 U.S.C. 5, thereby confirming that Congress distinguished between the two and acted intentionally in its disparate use of language.

4. Petitioners and their amici suggest that the court of appeals' interpretation places inordinate weight on the difference between a "transaction in" and a "transaction involving" foreign currency. See Pet. Br. 11 n.8. But Congress itself employed that distinction, and its reasons for doing so cannot be brushed aside as sloppy draftsmanship. To the contrary, Congress's purpose is illuminated by 7 U.S.C. 6c(b). That Section reflects Congress's historic prac-

tice, described at pages 3-11, *supra*, of regulating options differently, and more strictly, than futures.

From its inception, the CEA authorized trading in commodity futures, but until 1974, the Act imposed a corresponding prohibition on the purchase and sale of commodity options. See ch. 545, § 5, 49 Stat. 1494 (adding Section 4c of the CEA), codified at 7 U.S.C. 6c (1970). The CFTC Act preserved that ban with respect to traditional commodities, but gave the CFTC power to regulate or prohibit options in newly included commodities. See Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, Tit. IV, § 402, 88 Stat. 1412, codified at 7 U.S.C. 6c(a) and (b) (1976). When the CFTC adopted a regulation banning virtually all transactions in commodity options (43 Fed. Reg. 16,153 (1978)), Congress soon thereafter adopted an analogous statutory prohibition, see Futures Trading Act of 1978, Pub. L. No. 95-405, § 3, 92 Stat. 867, codified at 7 U.S.C. 6c(b) (Supp. II 1978), which it left in place until 1982. See Futures Trading Act of 1982, Pub. L. No. 98-444, Tit. II, § 206, 96 Stat. 2301, codified at 7 U.S.C. 6c (1982); Futures Trading Act of 1986, Pub. L. No. 99-641, Tit. I, § 102, 100 Stat. 3557, codified at 7 U.S.C. 6c (Supp. IV 1986).

Congress's adoption and subsequent amendments of 7 U.S.C. 6c demonstrate that it has consistently elected to regulate options differently from futures. It did so in the CFTC Act, which contained the Treasury Amendment. It is therefore unsurprising that Congress followed that practice in the Treasury Amendment with respect to foreign currency options. Congress accomplished that result by limiting the reach of the Treasury Amendment to "transactions in"—rather than "transactions involving"—foreign currency. See *ABT*, 803 F.2d at 1246-1248.

5. Congress's consistent practice of regulating options differently from futures has additional textual significance in light of the Treasury Amendment's "board of trade" proviso. As noted above, the Treasury Amendment provides in pertinent part:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency [and other specified financial instruments], *unless such transactions involve the sale thereof for future delivery conducted on a board of trade.*

7 U.S.C. 2(ii) (emphasis added). By its terms, the Treasury Amendment excludes "transactions in" foreign currency (and other financial instruments) from CEA regulation, but the board of trade proviso sweeps back within the CEA's coverage those "transactions" that "involve the sale thereof for future delivery conducted on a board of trade." As noted in our brief in opposition (Br. in Opp. 11-12), the meaning of the term "board of trade" is subject to dispute. But whatever interpretive difficulties that term presents, the board of trade proviso clearly applies only to *futures contracts* (commodity transactions involving the "sale thereof for future delivery") and does not apply to options.

The specific phraseology of the board of trade proviso is highly pertinent because it provides another indication that the Treasury Amendment as a whole does not reach options. As noted above, the CEA has consistently regulated options differently, and usually more strictly, than futures. Hence, one would expect that if Congress had intended to exclude both foreign currency futures and foreign currency options from CEA regulation, Congress would not only have made

that intention clear through specific "options" terminology in the opening clause of the Treasury Amendment, but it would also have made clear that both futures and options are subject to the Amendment's board of trade proviso. Congress's use of specific language in the board of trade proviso that clearly does *not* embrace options strongly suggests that Congress did not intend that the Treasury Amendment would exclude foreign currency options from regulation under the CEA in the first place.

6. Section 6c(f) of Title 7 provides yet another source of textual support for the court of appeals' conclusion. As we explain above, Congress enacted legislation in 1982 to resolve a jurisdictional dispute between the SEC and the CFTC over which agency had authority to regulate foreign currency options traded on national securities exchanges. See pages 13-14, *supra*. Congress amended Section 9(g) of the Securities Exchange Act to clarify that the SEC has exclusive jurisdiction over, among other things, options on foreign currency when traded on a national securities exchange. See 15 U.S.C. 78i(g).

In addition, Congress enacted 7 U.S.C. 6c(f) (see Pub. L. No. 97-444, Tit. I, § 102, 96 Stat. 2296), which states:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to any transaction in an option on foreign currency traded on a national securities exchange.

7 U.S.C. 6c(f). Although Section 6c(f) does not expressly grant any jurisdiction to the CFTC, the provision implies that the CFTC would have jurisdiction over foreign currency options that are not traded on a national exchange. The legislative history supports

that implication. See S. Rep. No. 384, 97th Cong., 2d Sess. 22 (1982) ("the CFTC will regulate [foreign currency options] when they are traded other than on a national securities exchange"); H.R. Rep. No. 565, 97th Cong., 2d Sess., Pt. 1, at 38 (1982) ("the CFTC will have jurisdiction to regulate the trading of options on foreign currency in the commodities markets"); *id.* at 39 (CFTC has jurisdiction over all "[o]ptions directly on foreign currency"). Section 6c(f) would have been unnecessary if the Treasury Amendment granted foreign currency options a blanket exclusion from CFTC regulation. Hence, it provides an additional indication that the Treasury Amendment does not exclude foreign currency options from regulation. Cf. *Stone* v. *INS*, 115 S. Ct. 1537, 1545 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

B. The Court Of Appeals' Interpretation Is Consistent With The Purposes Of The Treasury Amendment

As this Court has stated, "when a statute speaks with clarity to an issue, judicial inquiry into its meaning, in all but the most extraordinary circumstance, is finished." *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2147 (1995); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Demerest* v. *Manspeaker*, 498 U.S. 184, 190 (1991). Petitioners acknowledge that principle, Pet. Br. 16, but they also suggest that their interpretation is consistent with Congress's policy and general purposes in adopting the Treasury Amendment, *id.* at 13-15, 16-20. Petitioners' arguments, however, are not well founded.

1. Petitioners and their *amici* argue that because the Treasury Amendment excludes foreign currency

futures from regulation, it must also exclude options. They contend that foreign currency futures and options serve similar purposes to "hedge and/or shift risk," and that it is "completely illogical" to interpret the Treasury Amendment in a way that regulates one but not the other. Pet. Br. 13-14. But one could just as easily argue that grain futures and grain options serve interchangeable purposes and should be regulated the same way. Yet, as we have explained above, Congress has consistently concluded that public policy requires that grain options be regulated more strictly than grain futures. See pages 3-9, *supra*. In the case of foreign currency, Congress has expressed its intention in the Treasury Amendment through statutory language that draws a distinction between futures and options. This Court should not alter that result by resorting to general notions of statutory purpose in place of specific statutory language. See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990); *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

Congress had a reasonable basis in 1974 for concluding that options and futures should not be treated the same. Foreign currency market participants may consider futures and options as functionally and economically similar. But commentators have noted that "there are a number of important practical distinctions between commodity options and commodity futures contracts." Lower, *supra*, 1978 Duke L.J. at 1097 n.3 (noting that futures are subject to margin calls but options are not); see also 1 Snider, *supra*, at §§ 7.01-7.02. Furthermore, some courts have suggested that options create more serious risks of abusive practices and fraud. See *British*

American Commodity Options Corp. v. *Bagley*, 552 F.2d 482, 485 (2d Cir.) ("the options market may be peculiarly attractive to individual investors of relatively modest means and with a propensity for taking risks"), cert. denied, 434 U.S. 938 (1977); *Kelley* v. *Carr*, 442 F. Supp. 346, 349 (W.D. Mich. 1977) ("owing to the ease of market entry, * * * fly-by-night organizations are often attracted"), aff'd in part, rev'd in part, 691 F.2d 800 (6th Cir. 1980). In light of those considerations, Congress was entitled to conclude at the time that it enacted the Treasury Amendment that foreign currency options should not be included within the statutory exclusion. See 1 Snider, *supra*, at § 7.01 (noting that "well-publicized scandals * * * have led to governmental action to regulate restrictively and, in some cases, to ban the sale of commodity options").

2. Petitioners also contend that the court of appeals' construction would lead to an unmanageable situation because the court suggested that the actual exercise of an option is a "transaction in foreign currency." See Pet. App. 6a. They argue that, as a result, the regulation of an option would depend on whether or not it was ultimately exercised. Pet. Br. 14-15. Petitioners posit, however, a problem that does not really exist. Under the court's construction, the Treasury Amendment does not exclude from CEA regulation the purchase or sale of a foreign currency option (*i.e.*, the purchase or sale of a *right* to buy or sell a foreign currency at a prescribed price). It does, however, exclude from regulation the subsequent purchase or sale of the foreign currency itself, even though the right to enter into that subsequent transaction was acquired pursuant to an option that is subject to CEA regulation. Hence, the

court of appeals' reasoning results in a clearly demarked line: The purchase or sale of an option is subject to CEA regulation, but the transaction resulting from its subsequent exercise is not. Contrary to the arguments of petitioners and their amici, it poses no uncertainty over what transactions are subject to CEA regulation.

3. Petitioners additionally rely on the legislative history of the Treasury Amendment. Pet. Br. 16-20. The legislative history, however, does not support their position. As they note, the Acting General Counsel of the Treasury Department first proposed the legislation. See S. Rep. No. 1131, *supra*, at 49-51 (Letter from Donald L.E. Ritger, Acting General Counsel of the Department of the Treasury, to Senator Herman E. Talmadge, Chairman, Senate Committee on Agriculture and Forestry (July 30, 1974)), reproduced at App. B, *infra*, 10a-14a. The Treasury Department expressed concern about the prospect that the proposed CFTC Act would result in regulation of *futures trading* in foreign currencies, but it made no mention of foreign currency options. See *ibid.*

The portions of the Department's letter on which petitioners themselves rely demonstrate that the Department was concerned at that time with futures and not options:

> The Department believes the bills contain an ambiguity that should be clarified. The provisions of the bills do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of *futures trading* on organized exchanges, and would not extend to *futures trading* in foreign currencies off organized exchanges. * * *

> The Department feels strongly that *foreign currency futures trading*, other than on organized exchanges, should not be regulated by the new agency. Virtually all *futures trading* in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign currency exchange rate movements.

S. Rep. No. 1131, *supra*, at 49-50 (emphasis added); see Pet. Br. 17-18. The letter made specific reference to the potential regulation of "futures contracts," S. Rep. No. 1131, *supra*, at 50, and it suggested that other specific types of financial instruments (including some types of options) should be exempt from regulation, *id.* at 51, but it made no mention of foreign currency options. The letter urged only that the Committee "amend the proposed legislation to make clear that its provisions would not be applicable to futures trading in foreign currencies or other financial transactions of the nature described above other than on organized exchanges." *Ibid.* Congress adopted the Treasury Department's proposed language virtually verbatim. See *ibid.* (setting out the proposed language).

The Treasury Department's failure to address foreign currency options is understandable, because the market for that type of option apparently did not exist at that time. See Comm. on Futures Regulation, *supra*, at 18, 23; see also page 13, *supra*. That fact simply underscores that the Treasury Amendment should not be construed to reach foreign currency options unless the statutory language is

sufficiently broad to anticipate and encompass their eventual development. The Treasury Department's letter, which itself fails to herald their appearance, cannot accomplish that result.

Petitioners also suggest that an excerpt from the Senate Committee Report suggests that the Treasury Amendment has a broader meaning. See Pet. Br. 19. That excerpt, reproduced as it appears in the Report, states:

> Section 201 of the bill enlarges the definition of "commodity" to include all goods and articles, except onions, and "all services rights and interests in which contracts for future delivery are presently or in the future dealt in", and provides for the exclusive jurisdiction over all futures transactions which are executed on domestic boards of trade. The Commission will have exclusive jurisdiction over options trading in commodities (but not in securities).
>
> However, transactions in foreign currency, security warrants and rights, resales of installment loan contracts, repurchase options, government securities or mortgages and mortgage purchase commitments would not be subject to the Act unless they involve the sale thereof for future delivery conducted on a board of trade.

S. Rep. No. 1131, *supra*, at 31. Once that excerpt is set out with correct punctuation, compare Pet. Br. 19, one can see that it adds nothing new to the analysis. It simply restates the statutory language, including the limiting phrase "transactions in foreign currency." Compare 7 U.S.C. 2(ii).

4. Even if petitioners' concerns were sufficient to raise doubts about the reach of the Treasury Amendment, those doubts are insufficient to overcome the

court of appeals' interpretation. When this Court encounters doubts about the scope of a statutory provision that creates an exception to a general rule, this Court will normally read the exception narrowly in order to preserve the primary object of the legislation. See *City of Edmonds* v. *Oxford House, Inc.*, 115 S. Ct. 1776, 1780 (1995); *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989); *Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). That approach is particularly appropriate here, where the CFTC has statutory authority to exempt the conduct at issue from regulation if the CFTC determines that there is no need for regulatory oversight. See pages 10-11, *supra*.

C. Inter-Agency Disagreements Over The Scope Of The Treasury Amendment Should Not Alter This Court's Analysis Of The Statutory Text

The Treasury Amendment has sometimes prompted disagreement among the Treasury Department, the SEC, and the CFTC concerning their respective powers. Petitioners attempt to find support for their position in those inter-agency disagreements. Pet. Br. 21-25. Their description of those controversies, however, is neither accurate nor complete. In any event, those inter-agency disagreements should not affect how the Court resolves the issue before it, which involves purely a question of statutory construction.

1. Since its creation, the CFTC has faced various issues concerning the scope of its regulatory jurisdiction. See 1 Snider, *supra*, at §§ 10.01-10.26. As noted above, the *Board of Trade* litigation raised issues regarding the respective jurisdictions of the SEC and the CFTC with respect to options on GNMA securities. See pages 13-14, *supra*. The United States

Court of Appeals for the Seventh Circuit ruled in that case that the SEC lacked authority to regulate exchange-traded options in those securities, holding among other things that those options on the physical commodity—GNMA securities—were within the exclusive jurisdiction of the CFTC by virtue of the CEA's exclusive jurisdiction provision, now codified at 7 U.S.C. 2(i). See 677 F.2d at 1146. The court also ruled that the options were not exempted by the Treasury Amendment, concluding, like the court of appeals in this case, that options are not "transactions in" the underlying commodity. *Id.* at 1154. The court stated that the GNMA options would also fall within the Treasury Amendment's "board of trade" proviso, because "GNMA options 'involve' GNMA futures contracts presently being traded on the various contract markets including the Board of Trade." *Ibid.*

The United States petitioned for a writ of certiorari in that case, arguing, among other things, that the CFTC did not have exclusive jurisdiction to regulate trading in options on GNMA securities. See Pet. at 16-22, *SEC* v. *Board of Trade of Chicago*, No. 82-526. The United States contended, as we have explained herein at pages 28-29, *supra*, that the CEA's exclusive jurisdiction provision, 7 U.S.C. 2(i), applies to options on futures contracts, but not options on the physical commodity. 82-526 Pet. at 18-20. The United States also contended that the court had misinterpreted the Treasury Amendment's "board of trade" proviso. *Id.* at 20-22. But the United States did not challenge the court of appeals' ruling that a commodity option is not a "transaction in" the underlying commodity. See *ibid.*

Petitioners are accordingly mistaken in their assertion (Pet. Br. 23) that the United States has previ-

ously taken the position in this Court that a commodity option is a "transaction in" the underlying commodity. The United States challenged the *Board of Trade* decision on quite different grounds that are consistent with the government's position in this case. The Board of Trade litigation became moot while the government's certiorari petition was pending by virtue of the SEC/CFTC Jurisdictional Accord and implementing legislation. See *SEC* v. *Board of Trade of Chicago*, 459 U.S. 1026 (1982). And as we have explained, pages 36-37, *supra*, the implementing legislation supports the view that the Treasury Amendment does not exclude foreign currency options from CEA regulation. See 7 U.S.C. 6c(f).

2. The Treasury Department and the CFTC have also disagreed over the scope of the CFTC's jurisdiction. In 1985, during the pendency of the *ABT* litigation, the CFTC issued a statutory interpretation stating that the Treasury Amendment divested the CFTC of jurisdiction over "transactions in foreign currency" (7 U.S.C. 2(ii)) only "when such transactions are entered into by and between banks and certain other sophisticated and informed institutional participants." See *Trading in Foreign Currencies for Future Delivery*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,750 (CFTC Oct. 23, 1985) (statutory interpretation and request for comments), 50 Fed. Reg. 42,983 (1985). The Treasury Department transmitted comments to the CFTC that disagreed with the CFTC's construction and asserted that the Treasury Amendment "contains no language limiting the coverage of the exemption based upon the characteristics of participants in a transaction." Letter of Charles O. Sethness, Assistant Secretary of the Treas-

ury (May 5, 1986) (reproduced at Pet. App. 27d-29d).

The *Tauber* litigation, discussed at pages 15-16, *supra*, later became a focal point of that disagreement. The district court in that case rejected Tauber's argument that he was not obligated to pay foreign currency trading debts consummated without observance of CEA regulations, reasoning that the Treasury Amendment broadly excluded his futures and exercised options transactions from regulation. See 795 F. Supp. at 773, 775-776. The CFTC, which has independent litigation authority in the lower courts, filed an amicus curiae brief in that case urging the court of appeals to affirm the district court's judgment, but it proposed a theory that was different, in part, from the one that the district court advanced. The CFTC suggested that the Treasury Amendment would exclude Tauber's futures transactions from regulation if the court decided that Tauber's activities qualified him as a "sophisticated and informed institution." See CFTC Amicus Br. at 10, 17, in *Salomon Forex, Inc.* v. *Tauber*, No. 92-1406 (4th Cir.). The CFTC also suggested, in accordance with the district court's decision, that "the Treasury Amendment excludes performance obligations which arise once options on foreign currency are exercised." *Id.* at 11, 19-20. See 795 F. Supp. at 775-776.

At the request of the Treasury Department, the United States also filed an amicus curiae brief in *Tauber*. The United States urged affirmance, but solely on the theory advanced by the district court. The United States argued that the Treasury Amendment excluded Tauber's futures contracts from CEA requirements, explicitly agreeing with the district

court that "the phrase 'transaction in foreign currency' plainly and unambiguously means any transaction, without limitation as to the participants involved, in the commodity or subject matter." Pet. App. 19d-20d (reproducing the United States' brief). The United States also suggested that the "transactions in" language served to exclude options from coverage as well, *id.* at 22d-23d, but it concluded that the court of appeals did not need to address that question because the district court had found that the options in that case had been exercised, *id.* at 23d-24d.

Although the United States adheres to the view it expressed in *Tauber* that the Treasury Amendment exempts foreign currency *futures* from CEA regulation, subject only to the "board of trade" proviso, it has reconsidered the position expressed in *Tauber* with respect to foreign currency options. See page 46, *supra*. Upon further and extensive consideration of the Treasury Amendment and the CEA as a whole, set forth in the foregoing pages, we have concluded that the United States' suggestion in *Tauber* that foreign currency options are "transactions in foreign currency" was not correct. Heeding Justice Frankfurter's observation that newly acquired wisdom should not be rejected merely because it arrives late, see *Henslee* v. *Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting), the United States has modified its position on the basis of a more detailed analysis of the Act.

3. Petitioners suggest that "to the extent this Court determines an agency interpretation of the Treasury Amendment is relevant, it should look to the long-standing views of the Treasury Department." Pet. Br. 22. That argument, however, is inconsistent

with basic principles respecting judicial deference to agency interpretations. This Court gives deference to "the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). The CFTC is responsible for administering the CEA, *CFTC* v. *Schor*, 478 U.S. 833, 844-46 (1986). The Treasury Department has important responsibilities for the United States financial markets, and its views on that subject carry weight, but the CFTC's views are the ones that are entitled to *Chevron* deference. See *Smiley*, 116 S. Ct. at 1733 ("We accord deference to agencies under *Chevron*, not because they drafted the provisions in question, * * * but rather because of a presumption that Congress, when it left an ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency."); see also *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991).

This case, however, is not one that requires the Court to invoke *Chevron* deference principles. As this Court explained in *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. In this instance, the Court can ascertain through "traditional tools of statutory construction" that "Congress had an intention on the precise question at issue." *Id.* at 843 n.9. Hence, "that intention is the law and must be given effect."

Ibid. See, *e.g.*, *Estate of Cowart*, 505 U.S. at 477 (finding that the meaning of a statute is clear and hence there is no need to "resolve the difficult issues regarding deference which would be lurking in other circumstances").

As we explained in our brief in opposition to the petition for a writ of certiorari, the Court's resolution of the issue presented here will not fully resolve other legal issues involving the Treasury Amendment, including the significance of the board of trade proviso, which is not currently at issue in this case. See Br. in Opp. 10-12. The Treasury Department and the CFTC are currently conducting discussions aimed at arriving at a consensus on what the scope of the CFTC's regulation with respect to commodities named in the Treasury Amendment should be. Those discussions can take into account the institutional concerns of petitioners' amici, including their perception of the need for an exemption for interbank or other foreign-currency options transactions. As we have explained above (see pages 9-11, *supra*), the CFTC has broad authority under 7 U.S.C. 6(c) and 6c(b) to fashion exemptions for transactions in options involving foreign currency or other commodities from provisions of the CEA. The question presented here, however, is purely one of statutory construction. The court of appeals correctly ruled that the Treasury Amendment does not exempt foreign currency options from CEA regulation, and that the CFTC therefore has authority to bring this enforcement action.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS

Sections 2, 5, and 6c of Title 7 of the United States Code provide as follows:

§ 2. Accounts, agreements, and transactions subject to jurisdiction of Commodity Futures Trading Commission; relation to jurisdiction of Securities and Exchange Commission and Federal and State courts; excepted transactions

(i) The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in section 2a of this title, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities

from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. (ii) Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

* * * *

§ 5. Legislative findings

Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest. Such futures transactions are carired on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof in interstate commerce. The prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce. Such transactions are utilized by shippers, dealers, millers, and others engaged in handling com-

modities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price. The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed, to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein. Furthermore, transactions which are of the character of, or are commonly known to the trade as, "options" are or may be utilized by commercial and other entities for risk shifting and other purposes. Options transactions are in interstate commerce or affect such commerce and the national economy, rendering regulation of such transactions imperative for the protection of such commerce and the national public interest.

* * * *

§ 6c. Prohibited transactions

(a) Meretricious transactions

It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such com-

modity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) if such transaction is, of the character of, or is commonly known to the trade as, a "wash sale," "cross trade," or "accommodation trade," or is a fictitious sale; or

(B) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

(b) Regulated option trading

No person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe. Any such order, rule, or regulation may be made only after notice and opportunity for hearing, and the Commission may set different terms and conditions for different markets.

(c) Regulations for elimination of pilot status of commodity option transactions; terms and conditions of options trading

Not later than 90 days after November 10, 1986, the Commission shall issue regulations—

(1) to eliminate the pilot status of its program for commodity option transactions involving the trading of options on contract markets, including any numerical restrictions on the number of commodities or option contracts for which a contract market may be designated; and

(2) otherwise to continue to permit the trading of such commodity options under such terms and conditions that the Commission from time to time may prescribe.

(d) Dealer options exempt from subsections (b) and (c) prohibitions; requirements

Notwithstanding the provisions of subsection (c) of this section—

(1) any person domiciled in the United States who on May 1, 1978, was in the business of granting an option on a physical commodity, other than a commodity specifically set forth in section 2 of this title prior to October 23, 1974, and was in the business of buying, selling, producing, or otherwise using that commodity, may continue to

grant or issue options on that commodity in accordance with Commission regulations in effect on August 17, 1978, until thirty days after the effective date of regulations issued by the Commission under clause (2) of this subsection: *Provided,* That if such person files an application for registration under the regulations issued under clause (2) of this subsection within thirty days after the effective date of such regulations, that person may continue to grant or issue options pending a final determination by the Commission on the application; and

(2) the Commission shall issue regulations that permit grantors and futures commission merchants to offer to enter into, enter into, or confirm the execution of, any commodity option transaction on a physical commodity subject to the provisions of subsection (b) of this section, other than a commodity specifically set forth in section 2 of this title prior to October 23, 1974, if—

(A) the grantor is a person domiciled in the United States who—

(i) is in the business of buying, selling, producing, or otherwise using the underlying commodity;

(ii) at all times has a net worth of at least $5,000,000 certified annually by an independent public accountant using generally accepted accounting principles;

(iii) notifies the Commission and every futures commission merchant offering the grantor's option if the grantor knows or has reason to believe that the grantor's net worth has fallen below $5,000,000;

(iv) segregates daily, exclusively for the benefit of purchasers, money, exempted securities (within the meaning of section 78c(a)(12) of title 15), commercial paper, bankers' acceptances, commercial bills, or unencumbered warehouse receipts, equal to an amount by which the value of each transaction exceeds the amount received or to be received by the grantor for such transaction;

(v) provides an identification number for each transaction; and

(vi) provides confirmation of all orders for such transactions executed, including the execution price and a transaction identification number;

(B) the futures commission merchant is a person who—

(i) has evidence that the grantor meets the requirements specified in subclause (A) of this clause;

(ii) treats and deals with all money, securities, or property received from its customers as payment of the purchase price in connection with such transactions, as belonging to such customers until

the expiration of the term of the option, or, if the customer exercises the option, until all rights of the customer under the commodity option transaction have been fulfilled;

(iii) records each transaction in its customer's name by the transaction identification number provided by the grantor;

(iv) provides a disclosure statement to its customers, under regulations of the Commission, that discloses, among other things, all costs, including any markups or commissions involved in such transaction; and

(C) the grantor and futures commission merchant comply with any additional uniform and reasonable terms and conditions the Commission may prescribe, including registration with the Commission.

The Commission may permit persons not domiciled in the United States to grant options under this subsection, other than options on a commodity specifically set forth in section 2 of this title prior to October 23, 1974, under such additional rules, regulations, and orders as the Commission may adopt to provide protection to purchasers that are substantially the equivalent to those applicable to grantors domiciled in the United States. The Commission may terminate the right of any person to grant, offer, or sell options under this subsection only after a hearing, including a finding that the continuation of such right is contrary to the public interest: *Provided*, That pending the completion of such termination proceedings, the Commission may suspend the right to grant, offer, or sell options of any person whose activities in the Commission's judgment present a substantial risk to the public interest.

(e) Rules and regulations

The Commission may adopt rules and regulations, after public notice and opportunity for a hearing on the record, prohibiting the granting, issuance, or sale of options permitted under subsection (d) of this section if the Commission determines that such options are contrary to the public interest.

(f) Nonapplicability to foreign currency options

Nothing in this chapter shall be deemed to govern or in any way be applicable to any transaction in an option on foreign currency traded on a national securities exchange.

(g) Oral orders

The Commission shall adopt rules requiring that a contemporaneous written record be made, as practicable, of all orders for execution on the floor or subject to the rules of each contract market placed by a member of the contract market who is present on the floor at the time such order is placed.

APPENDIX B

Letter from the Acting General Counsel of the Treasury proposing the "Treasury Amendment," reproduced in Senate Report No. 1131, 93d Cong., 2d Sess. 49-51 (1974):

THE GENERAL COUNSEL OF THE TREASURY.
Washington, D.C., July 30, 1974.

Hon. HERMAN E. TALMADGE,
Chairman, Committee on Agriculture and Forestry,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The attenton of the Department has been directed to H.R. 13113, S. 2485, S. 2578 and S. 2837, bills to regulate futures trading in agricultural and other commodities, which are currently pending before your Committee.

Each of these bills would establish a Federal regulatory agency with sweeping authority to regulate futures trading in virtually any commodity, good, article, right or interest. This authority would extend to the regulation of futures trading in foreign currencies. Moreover, H.R. 13113 and S. 2578 would amend the Commodity Exchange Act, 7 U.S.C. Sec. 1, *et seq.*, to subject futures trading in foreign currencies to the regulatory requirements of that Act.

The Department believes the bills contain an ambiguity that should be clarified. The provisions of the bills do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of futures trading on organized exchanges, and would not extend to futures trading in foreign currencies off organized exchanges. We do not believe

that either the House of Representatives or your Committe intends the proposed legislation to subject the foreign currency futures trading of banks or other institutions, other than on an organized exchange, to the new regulatory regime.

The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency. Virtually all futures trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements. The participants in this market are sophisticated and informed institutions, unlike the participants on *organized* exchanges, which, in some cases, include individuals and small traders who may need to be protected by some form of governmental regulation.

Where the need for regulation of transactions on other than organized exchanges does exist, this should be done through strengthening existing regulatory responsibilities now lodged in the Comptroller of the Currency and the Federal Reserve. These agencies are currently taking action to achieve closer supervision of the trading risks involved in these activities. The Commodity Futures Trading Commission would clearly not have the expertise to regulate a complex banking function and would confuse an already highly regulated business sector. Moreover, in this context, new regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors.

Section 201 of H.R. 13113 currently contains broad language that would appear to authorize the new agency to regulate bank foreign currency departments. Section 201 provides that the new Commodity Futures Trading Commission would have "exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade, contract market or on any other board of trade, exchange, or market." The bill would amend the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, to broaden the definition of commodity to include all goods, articles, services, rights and interests "in which contracts for future delivery are presently or in the future dealt in." (Section 201). Since this definition would encompass foreign currencies, it seems clear that the language of the bill would give the Commission authority to regulate futures trading in foreign currencies by banks. Moreover, the language "or any other board of trade, exchange, or market" is sufficiently broad to authorize the Commission to regulate trading in foreign currencies by banks in the over-the-counter market.

S. 2837, S. 2485, and S.2578 are also, in our view, unclear whether they would authorize the regulation of futures trading in foreign currencies by banks. For example, section 301 of S. 2837 provides that it "is unlawful for any person to buy or sell, or offer to buy or sell, any futures contract except on an exchange registered under section 201." Section 201(a) provides that it is unlawful for an exchange to permit futures contracts to be traded on it unless the exchange is registered with the Futures Exchange Commission. A futures contract is defined as "an agree-

ment to buy or sell for delivery at a future time any specified quantities of goods, services, or other tangible or intangible things." (Section 102(3)). This definition is broad enough to include futures contracts in foreign currencies. The term "exchange" is defined broadly to mean "any place where futures contracts are traded." (Section 102(10)).

Accordingly, S. 2837 could be construed to prohibit banks from engaging in futures trading in foreign currencies unless they registered as an exchange with the new Futures Exchange Commission and became subject to its regulation. We believe that this is a serious defect in the proposed legislation that would, if enacted, impair the usefulness and efficiency of our foreign exchange markets.

In addition, the Department is concerned that the language of the bills is broad enough to subject to regulation by the proposed futures trading regulatory agency a wide variety of transactions involving financial instruments, such as puts and calls, warrants, rights, resale of installment loan contracts, repurchase options in Government securities, Federal National Mortgage Association mortgage purchase commitments, futures trading in mortgages contemplated by Federal Home Loan Mortgage Corporation, etc. We feel that regulation of these transactions which generally are between large, sophisticated institutional participants, is unnecessary, and could be harmful. For this reason, we do not believe it is contemplated that the bills should regulate transactions in financial instruments of that nature.

In view of the foregoing, we strongly urge the Committee to amend the proposed legislation to make clear that its provisions would not be applicable to

futures trading in foreign currencies or other financial transactions of the nature described above other than on organized exchanges. This could be accomplished by inserting a new section in an appropriate place reading as follows:

"Sec. —. Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, re-purchase options, government securities, mortgages and mortgage purchase commitments, or in puts and calls for securities, unless such transactions involve the sale thereof for future delivery conducted on a board of trade."

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

DONALD L. E. RITGER,
Acting General Counsel.

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No. 95-1181

In The

Supreme Court of the United States

October Term, 1995

WILLIAM C. DUNN &
DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Treasury Amendment exempts from CEA regulation "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). The ordinary meaning of "transactions in foreign currency" is "any commercial dealings involving foreign currency." (Pet. Br. 10-11 & n.8) Their exemption from the CEA achieves Congress' purpose (as explained by the Treasury Department, which proposed the Treasury Amendment) not to "confuse an already highly regulated business sector," and to avoid having "an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." S. Rep. No. 1131, 93d Cong., 2d Sess. 50, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888. That interpretation represented the considered position of the United States. (*See, e.g., Amicus Curiae* Brief of the United States in *Salomon Forex*, Pet. App. 10d)

The government – or more accurately, the CFTC – now reverses field, and contends that the CEA regulates foreign currency options. It claims that the ordinary meaning of "transactions in foreign currency" is irrelevant as it employs the "specialized terminology of the CEA" (CFTC Br. 21); however, it actually identifies no such "specialized terminology." Although the CFTC concedes the foregoing congressional purpose, it does not even try to explain how exempting foreign currency futures – while regulating foreign currency options – can be reconciled with such intent.

I.

If the terms of a statute are neither defined nor have an established common-law meaning, they "must be given their ordinary meaning." *Chapman v. United States*, 500 U.S. 453, 461-62 (1991). *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407, 2412 (1995); *Asgrow Seed Co. v. Winterboer*, 115 S. Ct. 788, 793 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."); *FDIC v. Meyer*, 114 S. Ct. 996, 1001-02 (1994).

The ordinary meaning of "transactions in foreign currency" is "any commercial dealings involving foreign currency." Both general usage and specialized legal dictionaries define "transactions" to mean commercial dealings, and "in" to mean involving or concerning. (*See* Pet. Br. 10-11 & n.8) As applied to the foreign currency options at issue in this case, the CFTC concedes that the purchase or sale of such an option is a transaction, but insists that it is not a "transaction[ ] *in* foreign currency." (CFTC Br. 33, emphasis in original) The CFTC's objection to the ordinary meaning of "transactions in foreign currency" is patently without merit, for six reasons.

1. The CFTC's sole textual argument[1] – that the purchase or sale of a foreign currency option is not a

[1] The CFTC fails to offer any definition that would exclude "transactions in foreign currency options" from the broader category of "transactions in foreign currency." It criticizes petitioners' analysis as "rest[ing] on a selection of dictionary definitions of the words 'transaction' and 'in' " and "fails to take into account the context in which those words are used here." (CFTC Br. 21; *see id.* at 27-28) However, it fails to offer either a contextual definition of "transactions in foreign currency" that excludes options, or a definition of "in" that

"transaction *in* foreign currency" (CFTC Br. 33; *see id.* at 22, 31, 32, 34) – fails to distinguish between futures (which the CFTC concedes are "transactions in foreign currency") and options (which the CFTC contends are not). Both are contract rights: a future is a contract obligating the seller to deliver at a future date a specific quantity of a given commodity for a fixed price; an option is a contract obligating the seller to deliver at a future date a specific quantity of a given commodity for a fixed price, if the option is exercised. Contrary to the CFTC's contention (CFTC Br. 21), neither futures nor options are "transactions 'in' the commodity itself." However, if a foreign currency future is a transaction *in* the commodity, as the CFTC concedes (CFTC Br. 30), so too must be a foreign currency option.

The CFTC's explanation of the alleged distinction between foreign currency futures and options (*id.*) actually demonstrates that both are transactions "in" foreign currency.

> The [futures] contract's creation of legal obligations respecting the sale and delivery of the

limits "transactions in foreign currency" to transactions in futures, as opposed to those in which the subject matter is foreign currency (including options). Instead, the CFTC attempts to escape the ordinary meaning of the Treasury Amendment by seeking extrinsic indicia of congressional purpose – namely, other sections of the CEA and Congress' alleged "historic practice" (CFTC Br. 33-34). Thus, the CFTC's methodology is flawed: the interpretation of a statute begins with the text. By declining to offer a definition of the text it must construe, the CFTC fails to offer an alternative interpretation to the ordinary meaning of the Treasury Amendment.

> commodity is a "transaction in" the commodity, even if (as is typically true in common experience) the transaction ultimately is extinguished before delivery by entry into an offsetting futures contract.

(*Id.*) The CFTC's reasoning is as applicable to foreign currency options as to futures. Both create "legal obligations respecting the sale and delivery" of foreign currency, and both are "in" foreign currency because that is their subject matter (even though futures and options typically do not cause foreign currency to change hands). Tellingly, even the CFTC's *amici* agree that its futures/options distinction is untenable, and that they must be treated identically for purposes of the Treasury Amendment. (*See Amicus Curiae* Brief of the Board of Trade of the City of Chicago ("CBT Br.") 13; *Amicus Curiae* Brief of the Chicago Mercantile Exchange ("CME Br.") 7-8, 17-18.)[2]

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[2] The CBT and CME disagree with Petitioners and their *amici*, however, and conclude that foreign currency futures and options are both regulated by the CEA. (*See* CBT Br. 10; CME Br. 7-8, 17-18) Such an interpretation is frivolous; if it were correct: (1) the Treasury Department erred in thinking that the amendment it proposed – which Congress adopted virtually verbatim – would "make clear that its [the CEA's] provisions would not be applicable to futures trading in foreign currencies or other financial transactions of the nature described above other than on organized exchanges." S. Rep. No. 1131, 93d Cong., 2d Sess. 51, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5889; (2) Congress enacted a superfluous provision, because the only "transactions in foreign currency" that possibly could be excluded (other than futures and options) are spot and forward contracts – which Congress already had exempted from regulation since 1921 (*see* 7 U.S.C. §§ 1a(11), 2(i); CFTC Br. 30); and (3) it would render meaningless not only the exemptive portion of the Treasury Amendment, but the board-of-trade savings clause as well – which brings under the CEA exchange-traded contracts "for future delivery" (7 U.S.C. § 2(ii)), and would serve no purpose if contracts for future delivery were not within the scope of exemption which it qualifies.

The exchanges suggest that the Treasury Department was "confus[ed]" (CME Br. 23); that Congress enacted a non-"substantive" provision (CBT Br. 19); and that Congress added a provision that was "somewhat unnecessary" (CME Br. 22 n.6). Rather than attribute ignorance and incompetence to the Executive and Legislative Departments, the statute should be construed in accordance with its ordinary meaning – in this case, that the Treasury Amendment excludes all commercial dealings involving foreign currency from regulation under the CEA. If the CBT and CME want legislation to force banks and other institutional investors to trade foreign currency futures and options on their exchanges, their efforts should be directed at Congress and not this Court.

2. The CFTC contends that options contracts – as opposed to futures contracts – are not "transactions in foreign currency" because they confer the "right" but not an "obligation" to "purchase or sell the foreign currency at some future date." (CFTC Br. 21) However, futures contracts do not necessarily impose an "obligation" to "purchase or sell the [commodity] at some future date."

The CFTC previously has held that an instrument may be a futures contract even if it imposes no obligation to purchase or sell the underlying commodity. *See, e.g., Policy Statement Concerning Swap Transactions*, 54 Fed. Reg. 30,694, 30,694-96, *reprinted in* [1987-90 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,494 at 36,143-45 (July 21, 1989) (applying the CEA to certain instruments which provide for the making of payments based on the value of a commodity). If a purchase or sale obligation were a legal requirement of a futures contract: (1) the safe

harbor relief granted by the CFTC to swaps and hybrid instruments (*see* 17 C.F.R. §§ 35, 34) – which rarely, if ever, involve the purchase or sale of a commodity – would have been unnecessary; and (2) the CFTC would have been barred from approving numerous exchange designations of futures contracts that only permit cash settlements with no obligation to buy or sell the underlying commodity (which in some cases does not even exist – *e.g.*, Eurodollars) at some future date. In authorizing the CFTC to designate contract markets for the sale of securities index futures, Congress required that such index futures be cash settled (and prohibited delivery of the underlying securities). *See* 7 U.S.C. § 2a(ii).

3. The CFTC discusses at great length the history of agricultural options trading in the United States, in an attempt to draw an inference with respect to the Treasury Amendment regarding Congress' alleged "historic practice . . . of regulating options differently, and more strictly, than futures." (CFTC Br. 33-34)[3] However, any such purported *general* practice regarding agricultural commodities has no bearing on Congress' *specific* purpose concerning the treatment of options on non-agricultural commodities – where it clearly elected not to regulate "transactions in foreign currency" – and thus provides no basis for concluding that this phrase excludes options.[4]

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[3] Contrary to the CFTC's contentions (CFTC Br. 26), construing the Treasury Amendment in accordance with its ordinary meaning would create no lacuna in the regulatory arsenal to prevent fraud; it simply would avoid piling-on redundant regulations. (*See* Pet. Br. 6, n.6; *Amicus Curiae* Brief of Crédit Lyonnais ("Banks Br.") 12-14)

[4] The ordinary meaning of the Treasury Amendment unambiguously includes all commercial dealings in foreign currency (including options). In any event, even if it were ambiguous, it still should be construed to include options. As between two inconsistent practices at different levels of generality, the more specific practice (here, exempting "transactions in foreign currency") is preferred to the general (here, regulating agricultural commodity options strictly), as it is closer (and thus more faithful) to the precise issue before the Court. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). In this case, even if Congress consistently regulated agricultural options more strictly than futures, such an historic practice tells nothing about Congress' intention respecting foreign currency options. By contrast, Congress' historic practice regarding foreign currency transactions – which were not regulated before 1974, at which time Congress acted decisively to exempt them (unless they were traded on an organized exchange) – provides a much better indication of its intention to exempt such options from CEA regulation. Congress' historic practice of not subjecting foreign currency transactions to commodities legislation is persuasive evidence that it did not intend to distinguish between foreign currency futures and options – and did not exempt the former, but subject the latter, to regulation under the CEA.

As the CFTC notes, in 1974 there was no established market for trading in options on foreign currency (or for that matter, on many of the newly included non-agricultural commodities). (CFTC Br. 13) Thus, it makes no sense for the CFTC to claim that Congress deliberately chose the words transactions "in" rather than "involving" foreign currency, so as not to include options on foreign currency within the scope of the Treasury Amendment's exclusion. (*See id.* 32) There is no evidence that Congress was concerned with distinguishing between futures and options "transactions in foreign currency" when it chose the particular words of the Treasury Amendment. (*Id.* 33-34)

4. In light of the Treasury Amendment's legislative purpose and all-inclusive language, Congress clearly used this broad phrase to cover any type of trading in the commodities listed in the Treasury Amendment, including options. There is no rational explanation for Congress to have used the preposition "in" to draw such a critical regulatory distinction – rather than straightforwardly limit the Treasury Amendment to "transactions in foreign currency futures."[5] Instead, such a contention ignores the reason for the coexistence of the different, but synonymous, prepositions "in" and "involving" – namely the existence of different authors for the two provisions, the original drafter(s) of H.R. 13111 in the House and the Treasury Department.[6]

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[5] The CFTC's statutory language analysis erroneously claims that "[t]he CEA's provisions are quite consistent in either referring to options expressly, or using more encompassing terminology than transactions 'in' a commodity, when referring to commodity options." (CFTC Br. 33) To the contrary, in the one place in the CEA where Congress directly addressed options in foreign currency, it used the word "in." *See* 7 U.S.C. § 6c(f) ("transaction *in* an option on foreign currency").

[6] The section of the CEA that uses the terms "transactions involving" any commodity (7 U.S.C. § 6c(b)) originated as § 402(iii) of H.R. 13113 (93rd Cong., 2d Sess.), which the House of Representatives passed on April 11, 1974. *See* 120 Cong. Rec. 10,769 (1974). The Senate Committee on Agriculture and Forestry, to which H.R. 13111 was referred, completed hearings on the House bill (and three related Senate bills) on May 22, 1994. *See* S. Rep. No. 1131, at 20, *reprinted in* 1974 U.S.C.C.A.N. at 5860. The Treasury Department proposed what became known as the Treasury Amendment in a letter to the Senate Committee on July 30, 1994. *See id.* at 49-51 (reproducing letter), *reprinted in* 1974 U.S.C.C.A.N. at 5887-89. The Senate Committee, in its executive mark-up on August 7 and 8, 1974, left unchanged the "transactions involving" language from

5. The Treasury Amendment exempts "transactions in foreign currency" and other specified financial instruments from CEA regulation – with a savings clause that brings back those transactions conducted on a board of trade. Rather than creating an anomaly (CFTC Br. 35-36),[7]

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§ 402(iii) of H.R. 13113, but amended § 201 of the House bill (the jurisdictional provision, which appeared 44 pages earlier) by adding the Treasury Amendment – using precisely the "transactions in" language proposed by the Treasury Department. *Compare* H.R. 13113, 93d Cong., 2d Sess. §§ 201, 402(iii) (Apr. 22, 1974) (House passed bill as referred to the Senate Committee on Agriculture and Forestry), *with* H.R. 13113, 93d Cong., 2d Sess. §§ 201, 302(c) (Aug. 29, 1974) (Senate floor bill); *see* S. Rep. No. 1131, at 6, 9, 23, 26 (confirming retention of House-passed provisions with addition of the Treasury Amendment), *reprinted in* 1974 U.S.C.C.A.N. at 5848, 5850, 5863, 5866. The Conference Committee renumbered the section in which the "transactions involving" language appears (from § 302(c) to § 402(c)), but left that provision and the jurisdictional provision substantively unchanged from the Senate-passed bill. *Compare* H.R. 13113, 93d Cong., 2d Sess. §§ 201, 302(c) (Senate floor bill), *with* H.R. Rep. No. 1383, 93d Cong., 2d Sess. 9, 27 (reprinting H.R. 13111, 93d Cong., 2d Sess. §§ 201, 402(c) as passed by Congress); *see id.* at 35, 40 (1974) (Joint Explanatory Statement of the Committee of Conference confirming retention of Senate-passed provisions, including the Treasury Amendment), *reprinted in* 1974 U.S.C.C.A.N. 5897, 5901-02.

[7] Limiting "transactions in foreign currency" to futures would not cure the CFTC's alleged anomaly (i.e., that including options within that phrase would conflict with the savings clause), because at least three of the other financial instruments exempt from CEA regulation by the Treasury Amendment are options which could not be regulated under (the CFTC's interpretation of) the savings clause. As the CFTC correctly notes (CFTC Br. 31 & n.*), security warrants, security rights, and repurchase options either are or include options. If the CFTC is

the language of that savings clause provides further support for the interpretation that "transactions in foreign currency" includes options.

The CFTC recognizes (*id.* 28) that the language of the Treasury Amendment's savings clause ("transactions involv[ing] the sale thereof for future delivery") is nearly identical to that of the CFTC's jurisdictional grant under § 2(i) ("transactions involving contracts of sale of a commodity for future delivery"). Attempting to overcome the obvious conclusion that both apply to futures and options (and, therefore, that "transactions in foreign currency" that precedes the savings clause in the Treasury Amendment also covers futures and options), the CFTC speciously argues that: (a) its regulatory authority over commodity options arises under § 6c(b), rather than § 2(i);[8] and (b) § 2(i) only refers to options on futures contracts, but not options on a commodity itself. (*Id.* 28-29)

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correct that the savings clause is limited to futures contracts, then Congress simply did not regulate options differently, and more strictly than, futures in the Treasury Amendment. The CFTC's narrow interpretation of the savings clause (which it would presumably abandon in another case for a broader construction that included exchange-traded options) illustrates yet again the danger of interpreting a text by reference to an alleged "historic practice" (*id.* 33-34; *see id.* at 22), and then imposing that interpretation on the statutory text regardless of how ill it fits.

[8] The CFTC contends that § 2(i)'s grant of exclusive *jurisdiction* to the CFTC over "transactions involving contracts of sale for future delivery" of a commodity extends only to futures contracts and options thereon (but not to commodity options), while claiming that § 6c "gives the CFTC *additional* (albeit nonexclusive) *authority* over options," including options on the commodity itself. (CFTC Br. 29, emphasis supplied)

a. The CFTC cannot have the *authority* to regulate an instrument with respect to which it does not have express *jurisdiction*. *See Interstate Commerce Commission v. Texas*, 479 U.S. 450, 455-56 & n.9 (1987). Thus, it cannot validly claim that § 2(i) does not confer CFTC jurisdiction over commodity option transactions, while also asserting that § 6c(b) gives it "additional" authority to regulate such transactions. Instead, CFTC authority to prohibit or permit option trading under § 6c(b) extends only to an option "transaction involving any commodity regulated under this chapter" – *i.e.*, those over which the CFTC already has jurisdiction. Accordingly, the CFTC's jurisdiction over commodity options, including off-exchange foreign currency options, must come from § 2(i) – the CEA's jurisdictional grant.[9]

b. In describing the CFTC's "[e]xclusive jurisdiction over futures trading" under § 2(i), the Senate Report states that "the Commission's jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements, and commodity options." *See* S. Rep. No. 1131 at 6, *reprinted in* 1974 U.S.C.C.A.N. at 5848. By using the same terms (commodity "accounts" and

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[9] The Courts of Appeals for both the Second and Seventh Circuits have recognized that the CFTC's exclusive jurisdiction extends to commodity options. *See CFTC v. American Board of Trade*, 803 F.2d 1242, 1248 (2d Cir. 1986); *Board of Trade of Chicago v. SEC*, 677 F.2d 1137, 1146-47 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982). In particular, the Seventh Circuit found § 2(i)'s reference to "transactions involving contracts of sale for future delivery of a commodity" to be broad enough to confer jurisdiction to the CFTC over commodity options as well as futures contracts.

"agreements") in the legislative history as appear in § 2(i), it is fair to conclude that the phrase that follows in § 2(i) ("transactions involving contracts of sale of a commodity for future delivery") was intended to include commodity "options" (the phrase that follows in the legislative history).

Thus, contrary to the CFTC's assertions (upon which its entire statutory analysis depends), the phrase in § 2(i) (i.e., "transactions involving contracts of sale of a commodity for future delivery") includes option transactions[10] – thereby providing it with jurisdiction over commodity options.[11] Similarly, despite the CFTC's

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[10] Even if § 2(i) were construed not to cover commodity options, the reference in the Treasury Amendment's board of trade provision is not constrained to transactions involving "contracts of sale," but applies to transactions involving the "sale" of a commodity for future delivery. Thus, even under the CFTC's statutory construction, where "transactions involving contracts of sale of a commodity for future delivery" refers only to futures contracts, the board of trade provision is obviously worded more broadly to embrace options transactions (which create obligations involving the "sale" of a commodity, if not an actual "contract of sale").

[11] That the Treasury Amendment was intended to remove from CFTC jurisdiction *all* transactions in foreign currency, including options, is evident from the juxtaposition of language in the Senate Report. *See* Pet. Br. 19 (noting that S. Rep. No. 1131, at 31, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5870, stated at the conclusion of its description of what "would be regulated" under the amended CEA, that: "The Commission will have exclusive jurisdiction over *options trading in commodities* (but not in securities). However, *transactions in foreign currency* . . . would not be subject to the Act unless they involve the sale thereof for future delivery conducted on a board of trade.")

unsupported assertion (CFTC Br. 35), the savings clause does not "clearly" apply only to futures; instead, the virtually identical language in the Treasury Amendment (i.e., "transactions involv[ing] the sale thereof for future delivery") also covers both futures and options transactions. Therefore, the phrase "transactions in foreign currency," and the Treasury Amendment itself, also must include both futures and options transactions. *See Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 975 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994) (concluding that the Treasury Amendment's savings clause must be no broader than its preceding clause).

6. Contrary to the CFTC's contentions (CFTC Br. 36-37), construing the Treasury Amendment to exempt off-exchange foreign currency options from CEA regulation does not render superfluous 7 U.S.C. § 6c(f) – which was added in 1982 to apportion jurisdiction over financial instruments between the CFTC and the SEC. In enacting the Shad-Johnson Accord in 1982, Congress added this section to clarify that the CFTC's exclusive jurisdiction did not extend to options traded on a national securities exchange, which instead fell within the jurisdiction of the SEC. (*See also* 15 U.S.C. § 78i(g)) In this respect, § 6c(f) only removed one particular type of board of trade, a national securities exchange, from the CFTC's exclusive jurisdiction.

The CFTC concedes (CFTC Br. 36), that § 6c(f) "does not expressly grant any jurisdiction to the CFTC." More importantly, § 6c(f) implies only that *on*-exchange foreign currency options (on exchanges other than national securities exchanges) are regulated by the CEA, not that *off*-exchange options (such as those at issue in this case) are

subject to such regulation. The legislative history gathered by the CFTC, which is admittedly vague, discusses the CFTC's regulation of exchange-traded foreign currency options. *See* H. R. Rep. No. 565, 97th Cong., 2d Sess., Pt. 1, at 38 (1982) ("the CFTC will have jurisdiction to regulate the trading of options on foreign currency in the commodities markets"). Since it is undisputed that the CFTC has authority to regulate *on*-exchange foreign currency options, § 6c(f) is not rendered superfluous by properly construing the Treasury Amendment to exempt such *off*-exchange transactions. (CFTC Br. 37)[12]

II.

The Treasury Amendment must be interpreted in light of its congressional purpose, as indicated by the broad and unqualified language of the Treasury Amendment, to exclude CEA regulation and promote efficiency in the *entire* foreign exchange market. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 50-51, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888-89 (emphasis added); 7 U.S.C. § 2(ii). The Treasury Department's proposal to exempt "transactions in foreign currency," and Congress' adoption of that proposal, was intended to exempt *all*

[12] Contrary to the suggestions of the Association *amici*, this Court should not remand for further factual determinations regarding the "board of trade" issue. (*See Amicus Curiae* Brief of the Foreign Exchange Committee at 25-27) That question is not presented to this Court, and the CFTC has not disputed that Petitioners traded *off*-exchange. (*See* Pet. Br. 5 n. 5) Therefore, the issue before this Court is whether the Treasury Amendment excludes from CFTC jurisdiction *all* transactions in foreign currency – an issue based solely on statutory interpretation (without any further required fact finding).

commercial dealings involving foreign currency. The CFTC's suggestion (CFTC Br. 31; *see id.* at 36) that "Congress would have included foreign currency options" by name in the Treasury Amendment "if that was its intention," is without merit.

If Congress intended to exempt then-unknown foreign currency transactions (in addition to futures transactions), it either could attempt to list these unknown transactions by name, or it could exempt the entire category of such transactions. Although the Treasury Department specifically discussed only one type of transaction in foreign currency – foreign currency futures (*see* CFTC Br. 40), its proposal (and Congress' adoption) of language exempting "transactions in foreign currency" generally, rather than "transactions in foreign currency futures" specially, only can be understood as exempting *all* foreign currency transactions (futures, options, and others) from CEA regulation. Since it is difficult to foretell the future of dynamic financial markets[13] (and since economy of language is a virtue), Congress cannot properly be penalized for adopting the more concise – and effective – of two verbal formulations. Indeed, as contemplated by Congress, since the enactment of the Treasury Amendment, the foreign currency markets have grown[14] – not

[13] Congress' intent that the 1974 amendments to the CEA would embrace future developments in the commodity markets also is evidenced by its expansion of the definition of "commodity" to include "all services, rights, and interest in which contracts for future delivery are presently *or in the future dealt in*." *See* § 1a(3) (emphasis added)

[14] *See Statutory Interpretation Concerning Forward Transactions*, 55 Fed. Reg. 39,188, *reprinted in* [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,925 (Sept. 25, 1990)

only in trading in futures, but also in off-exchange options – all of which are included within the appropriately broadly phrased jurisdictional exemption for "transactions in foreign currency."[15]

Finally, the Treasury Department ("which is responsible for managing the international financial policy of the United States," CFTC Br. 25), and the money-center banks (which play a critical role in implementing that policy,

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(where the CFTC interpreted the CEA's cash forward exclusion, 7 U.S.C. § 1a(11), to apply to transactions that did not exist at the time the provision was passed, but were deemed to fit within the purpose of the exclusion).

[15] Even where a particular result may not have been specifically contemplated at the time a statute was enacted, the legislature nevertheless may have "designed the statute to cover numerous [matters] not specifically within its contemplation." *Agency Holding Corp. v. Mallei-Duff & Assocs.*, 483 U.S. 143, 159 (1987) (concurring opinion, Scalia, J.) (citing reasoning in *McCluny v. Silliman*, 3 Pet. 270 (1830) *See, e.g., Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."); *Kosak v. United States*, 465 U.S. 848, 855-61 (1984) (expansively interpreting a statutory exception to liability under the Federal Tort Claims Act in light of the broad legislative goals of excluding "certain government activities" from liability and threat of suit). In contrast, the case on which the CFTC relies, *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776, 1780 (1995), stands only for the basic principle that an exception to a broad statutory scheme should not be interpreted expansively, where to do so would undermine the purpose of the statute. Here, however, a broad interpretation of the Treasury Amendment, in light of the expansion of the CEA's jurisdiction in 1974, is consistent with the language and purpose of Congress to protect the off-exchange foreign currency markets from any potential adverse impact of regulatory interference.

Banks Br. 2), agree that construing foreign currency options to be outside the Treasury Amendment – and therefore regulated by the CEA – could drive off-shore the daily $40 billion market for foreign currency options (to London and other competing financial centers), or onto organized exchanges, such as the CFTC's *amici* (which already are avoided because of their relatively inflexible terms, high transaction costs, and lack of liquidity). (*See* CFTC Br. 25; Banks Br. 2, 16)[16]

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[16] It is no answer for the CFTC to assert (CFTC Br. 26), that "it may find that it is appropriate to exempt those transactions that are of concern to the Treasury Department and the various amici that have filed briefs in support of petitioners." However, the method by which "this exemption might apply to most foreign currency options traded in the OTC currency market is far from clear." (Banks Br. 15) (*See generally id.* 14-16, describing these limited and ambiguous exemptions) The CFTC's largely unexercised authority to exempt transactions in foreign currency options from CEA regulation (7 U.S.C. §§ 6(c), 6c(b)), is thus no substitute for the Treasury Amendment's automatic statutory exclusion. Congress adopted that Amendment (in the words of the Treasury Department, which proposed it), to ensure that the CEA did not "have an adverse impact on the usefulness and efficiency of foreign exchange market for traders and investors." S. Rep. No. 1131, 93d Cong., 2d Sess. 50, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5887. The CFTC has not generally exempted transactions in foreign currency options, has not proposed and does not necessarily see the need for such an exemption (*see* CFTC Br. 49, describing the "perception of the need for an exemption"), and is unlikely to appreciate such a need, since its mission does not extend to international financial policy.

III.

The Solicitor General does not request deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) for the CFTC's interpretation of the Treasury Amendment. (CFTC Br. 48) Indeed, in this case, such deference is not only unnecessary, but inappropriate – due to the CFTC's inconsistent interpretations over the last 20 years. (*See* Pet. Br. 23-24 n.16, collecting cases)[17]

Since its creation in 1974, the CFTC has held three inconsistent interpretations of the Treasury Amendment. First, in 1975, the CFTC agreed with the Treasury Department that the Treasury Amendment excludes from CEA regulation all off-exchange foreign currency transactions. (*See* Pet. Br. 22 n.15, which has not been contested by the CFTC). However, by 1985, the CFTC qualified that interpretation, and declared that the Treasury Amendment excludes from CEA regulation "certain off-exchange

[17] Moreover, even if the CFTC consistently had interpreted the Treasury Amendment to distinguish between foreign currency futures and options, it still would not merit *Chevron* deference because both the CFTC and the Treasury Department have policy-making authority with respect to foreign currency options, and their positions conflict. Although the CFTC regulates futures markets, the Treasury Department is responsible for the Nation's "international financial policy." (CFTC Br. 25; *see* 31 U.S.C. § 321(b)(1)) The Treasury Amendment thus marks the boundary between two agencies. Since each agency has policymaking authority and can issue interpretations that potentially merit *Chevron* deference, the interpretative question cannot be resolved simply by deferring to one of the two conflicting interpretations. *Cf. Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 152-54 (1991).

transactions in foreign currencies and other enumerated financial instruments," but "only when such transactions are entered into by and between banks and certain other sophisticated and informed institutional participants." *Trading in Foreign Currencies for Future Delivery*, 50 Fed. Reg. 42,983, 42,984, *reprinted in* [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,750 at 31,122 (Oct. 23, 1985); *see id.* at 42,983-85 & n. 13; ¶ 22,750 at 31,122-24 & n. 13. This also was the CFTC's position in the Fourth Circuit in *Salomon Forex*[18] and in the Second Circuit below.[19] Indeed, this was its position as recently as June 12 of this year, *after* this Court had granted certiorari. *See CFTC Interpretative Letter No. 96-55*, [Current] Comm. Fut. L. Rep. (CCH) ¶26,760, at 44,150-51 (1996) ("The Commission continues to adhere to such interpretative position.").

Now, for the first time in its brief to this Court, the CFTC contends that all futures – even those traded by "unsophisticated" parties – are included within the Treasury Amendment, and are therefore exempt from CEA regulation. (*See* CFTC Br. 30: "The Treasury Amendment's

[18] *See Amicus Curiae* Brief of the CFTC in *Salomon Forex*, 9-10 ("Congress adopted the [Treasury] Amendment in order to exclude transactions between sophisticated and informed institutions that ordinarily trade in the enumerated financial instruments"); *see also id.* at 17.

[19] *See* Brief of Plaintiff-Appellee CFTC in *CFTC v. Dunn*, No. 94-6197 (2d Cir. Sept. 12, 1994) at 19, n. 19 ("the CFTC's longstanding interpretation of [the] Treasury Amendment with respect to futures contracts" is that it "exclude[d] from the ambit of the Act only transactions by and between banks and certain other sophisticated, informed institutions"); *see also id.* at 27, 29.

reference to 'transactions in foreign currency' clearly excludes foreign currency futures contracts from CEA regulation unless they are conducted on a board of trade.") The CFTC's litigating position in this Court is not the kind of consistent agency interpretation entitled to *Chevron* deference. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Since the CFTC's litigation position in this Court does not merit *Chevron* deference, the question before the Court is simply which party offers the better interpretation of the Treasury Amendment. The pertinent terms of the Treasury Amendment are not defined by the statute and have no established common-law meaning. Accordingly, the ordinary meaning of the text should control: "transactions in foreign currency" means "all commercial dealings involving foreign currency" (including options).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,
Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE FOREIGN EXCHANGE COMMITTEE, THE NEW YORK CLEARING HOUSE ASSOCIATION, THE FUTURES INDUSTRY ASSOCIATION, THE MANAGED FUTURES ASSOCIATION AND THE PUBLIC SECURITIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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July 12, 1996

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Pursuant to Rule 37.3 of this Court, the Foreign Exchange Committee (the "FX Committee"), The New York Clearing House Association (the "Clearing House"), the Futures Industry Association (the "FIA"), the Managed Futures Association (the "MFA") and the Public Securities

Association (the "PSA") (collectively, the "Industry Associations") respectfully submit this brief with the consent of all the parties.

Interests of *Amici Curiae*

The Industry Associations represent many of the most significant participants in foreign currency futures and options trading in the United States.

Formed in 1978 under the sponsorship of the Federal Reserve Bank of New York, the FX Committee includes representatives of major domestic and foreign commercial and investment banks and foreign exchange brokers.[1/] The objectives of the FX Committee are to (i) provide a forum for discussing technical issues in the foreign exchange and related international markets, (ii) serve as a channel of communication between those markets and the Federal Reserve and, when appropriate, to other official institutions in the United States, (iii) enhance knowledge and understanding of the foreign exchange and related international markets, (iv) foster improvements in the quality of risk management in those markets, and (v) develop recommendations and prepare issue

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1/ The members of the FX Committee are AIG Trading Corporation, Bank of America, The Bank of Boston, Bank of Montreal, The Bank of New York, The Bank of Tokyo, Ltd., Bankers Trust Company, The Chase Manhattan Bank, CIBC-Wood Gundy, Citibank, N.A., Deutsche Bank, A.G., First Bank, N.A., The First National Bank of Chicago, Goldman Sachs & Co., Lasser Marshall Inc., Manufacturers & Traders Bank, Merrill Lynch & Co., Inc., Midland Bank plc, Morgan Guaranty Trust Company of New York, Morgan Stanley & Co. Incorporated, NationsBanc-CRT, Republic National Bank of New York, Royal Bank of Canada, Swiss Bank Corporation and Tullett & Tokyo Forex International Ltd.

papers on specific market-related topics for circulation to market participants and others.

The Clearing House is an unincorporated association of eleven leading commercial banks in New York City, a majority of which are active in foreign currency trading.[2/] The Clearing House operates the Clearing House Interbank Payments System ("CHIPS"), a large-value funds transfer system that is the primary means by which international U.S. dollar payments are made and settled. CHIPS handles an average of $1.3 trillion of payments each day of which approximately 30% of the number of items and 50% of the dollar value are related to foreign exchange settlements.

The FIA is a national trade association representing the futures industry. Its members include approximately ninety of the largest futures brokerage firms, which effect more than 80% of the transactions conducted on United States futures exchanges, as well as users of the futures markets such as commercial and investment banks, commodity pool operators, commodity trading advisors, and pension, insurance and mutual fund managers. The FIA's members are active in the over-the-counter ("OTC") foreign currency markets.[3/]

2/ The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, Citibank, N.A., Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, Fleet Bank N.A., European American Bank and Republic National Bank of New York.

3/ The OTC markets are separate and distinct from commodity exchanges designated by the Commodity Futures Trading Commission ("CFTC") for foreign exchange futures and options trading. Foreign currency transactions in the OTC

(continued...)

The MFA is a not-for-profit association representing the managed futures industry, including leading domestic and international managers, foreign exchange dealers, banks, commodity pool operators, commodity trading advisors, futures brokerage firms, exchanges and service providers involved in professional asset management. Its members are also active in the OTC foreign currency markets.

The PSA is the bond market trade association representing approximately 275 securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. The PSA's members include all of the primary dealers in government securities recognized by the Federal Reserve Bank of New York, as well as other securities dealers. The PSA actively represents its members in connection with all aspects of legislative and regulatory matters affecting or potentially affecting the government securities market, including the market for United States Treasury securities and mortgage-backed and non-mortgage-backed securities issued by United States government agencies and government sponsored enterprises.[4/]

[3/](...continued)
markets are bilateral, customized agreements subject to individual negotiation. In contrast, foreign exchange contracts traded on designated exchanges are largely fungible, with the price and timing of the trade being the only variables.

[4/] The volume of outstanding government securities and the daily trading volume in the government securities markets significantly exceed those of the other OTC markets. For example, the average daily trading volume in government securities, comprised of Treasury securities and mortgaged-backed and non-mortgaged-backed securities issued by United
(continued...)

Certain members of the Industry Associations have been entering into OTC foreign currency transactions with each other and other counterparties in the United States and around the world for years, with the understanding that their activities were not subject to the Commodity Exchange Act (the "CEA").

The holding of the United States Court of Appeals for the Second Circuit — that OTC foreign currency options[5/] are

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[4/](...continued)
States agencies and government sponsored enterprises, exceeds $280 billion (of which approximately $211.1 billion represents Treasury securities). The volume of outstanding government securities exceeds $4.2 trillion (of which approximately $3.4 trillion represents Treasury securities).

[5/] Foreign currency options are agreements conveying the right, but not the obligation, to buy or sell a specified amount of currency at a specified exchange rate. In entering into a foreign currency option, the purchaser and seller agree that the purchaser has the right to cause the seller either to take delivery of a particular currency from (a "put") or to deliver the currency to (a "call") the purchaser in exchange for another specified currency at an agreed upon rate (the "strike price"). In the case of a call option, for example, the purchaser will exercise the option if the option is "in the money" — that is, if the current cash market rate of exchange exceeds the strike price — because exercising the option will be a less expensive means of acquiring the relevant currency than purchasing it in the cash market. On the other hand, the purchaser will not exercise the option if the option is "out of the money" — that is, if the current cash market rate of exchange of the two currencies is less than the strike price — because the purchaser could buy the relevant currency more
(continued...)

subject to the CEA — creates significant legal uncertainty over the enforceability of a substantial volume of foreign exchange options contracts, could impose great regulatory and transactional costs on the OTC foreign currency markets and could possibly drive those OTC markets out of the United States. The ruling also may put market participants in this country, including certain members of the Industry Associations, at a disadvantage in global competition.

Indeed, many large-scale participants in foreign currency transactions, which historically have centered their business activities in the United States, could in response to the Second Circuit's decision shift the center of their foreign currency trading to their overseas offices to the detriment of the United States markets. Such a shift could result in a lessening of the liquidity of domestic foreign currency markets, which in turn could have an adverse impact on those United States businesses that engage in foreign trade and thus rely on those markets to assist their dealings in international commerce.

United States firms transacting business abroad require highly liquid OTC markets so that they can obtain the best prices for their currency purchases and sales. If the OTC foreign currency markets here in the United States were to become less liquid, those firms would likely have to shift their currency purchases and sales to more liquid financial centers offshore, such as in London, with operating hours less convenient to their business.

5/(...continued)
cheaply in the cash market. Even so, options have realizable economic value that can increase (or decrease) as the underlying exchange rate changes prior to expiration of the option, whether or not the option is exercised or is "in the money."

For these reasons, as well as those set forth below, the issue presented in this case is of vital importance to the members of the Industry Associations and to the United States economy.6/

Statutory Provision Involved

This case involves the interpretation of the so-called "Treasury Amendment" to the CEA — in particular, the phrase "transactions in foreign currency." The Treasury Amendment provides:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. § 2(ii).

6/ The PSA and its members have an interest in the disposition of the instant litigation relating to whether foreign currency options are "transactions in" foreign currency because the Treasury Amendment also excludes from the CEA "transactions in" government securities. If the Court were to adopt a narrow construction of the phrase "transactions in," certain segments of the government securities market may be subjected to legal uncertainty as to the applicability of the CEA. Other segments, however, would be unaffected, including government securities options that would remain excluded from CFTC jurisdiction by virtue of the CEA's Shad-Johnson Accord amendments. 7 U.S.C. § 2a(i).

Statement of the Case

1. The OTC Foreign Currency Markets

The OTC foreign currency markets are highly evolved, sophisticated and very active. Trading is conducted twenty-four hours a day, from 6:00 a.m. Sydney, Australia time on Monday until 5:00 p.m. New York time on Friday, with exchange rate quotations available worldwide on computer screens and similar electronic devices. OTC transactions are not conducted on organized exchanges. Instead, most trading is conducted over the telephone directly with dealers or through brokers. These markets are extremely sensitive to political and financial developments around the world and around the clock.

In addition to commercial and investment banks, the most significant participants in the OTC currency markets are foreign exchange dealers and brokerage companies, corporations, money managers (including pension, mutual fund and commodity pool managers), commodity trading advisors, insurance companies, governments and central banks. Indeed, governments and businesses have historically relied upon the OTC currency markets to serve a number of their fiscal and commercial needs. For example, the Federal Reserve Bank of New York (on behalf of the United States and foreign central banks), foreign central banks and foreign governments frequently intervene in the OTC markets in an effort to implement their policies with respect to their national currencies.

The importance of the OTC currency markets to the United States economy is considerable. United States businesses and financial institutions depend on active trading in, and the orderly functioning of, the OTC currency markets. These liquid markets provide businesses with access to international markets for goods and services by providing the foreign currency necessary for transactions worldwide.

The OTC foreign currency markets also assist international businesses faced with the vagaries of global interest rate and currency volatility by providing a means of managing the risk of adverse exchange rate movements. OTC foreign currency futures and options contracts are commonly used to hedge inventories, accounts receivable or payable and contract bids denominated in a particular currency. Such contracts allow participants to shift the risk of adverse exchange rate movements to a counterparty willing to accept that risk, thereby enhancing their ability to engage profitably in international commerce.

The global significance of these OTC markets and the full scope of trading activity in this country are evident from a triennial survey conducted by twenty-six national monetary authorities and coordinated by the Bank for International Settlements ("BIS") in Basle, Switzerland. With respect to foreign currency "forwards,"[7/] this survey reports that the average daily turnover in these twenty-six countries was approximately $100 billion in April 1995, representing approximately a 70% increase over the prior three-year

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7/ The generic term "forward" is colloquially used and is used at places in this brief to refer generally to forward transactions in the OTC foreign exchange markets without regard to the regulatory status of the particular contract — *i.e.*, without regard to whether the contract is a "futures contract" or a "cash forward" contract under the CEA. As noted below, cash forwards are excluded from CEA coverage pursuant to 7 U.S.C. § 1a(11).

period.[8/] With respect to foreign currency options, the survey reports that the average daily turnover was $40 billion in April 1995, representing a 29% increase over the prior three-year period.[9/] Approximately one-half ($20 billion) of the daily turnover of OTC currency options is attributable to the United States.[10/] Collectively, the United States, United Kingdom and Japan account for more than half (56%) of all the global daily turnover in foreign exchange. The United States and United Kingdom rank top in the world, with 16% and 30%, respectively, of the global daily turnover in foreign exchange.[11/]

2. The Treasury Amendment

The CEA regulates commodity futures and options trading. *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 360-63 (1982). It requires, among other things, that all commodity futures and options trading take place on exchanges approved and regulated by the CFTC (so-called "contract markets"), unless such activities

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8/ *Compare* BIS, "Central Bank Survey of Foreign Exchange and Derivatives Market Activity 1995" at Table 1-A (May 1996); *with* BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1992" at Table 1-A (March 1993).

9/ BIS, "Central Bank Survey of Derivatives Market Activity: Release of Preliminary Global Totals" at 4 (Dec. 18, 1995).

10/ Federal Reserve Bank of New York, "Central Bank Survey of Derivatives Markets Activity Results of the Survey of the United States" at Annex II, Table 5-U.S. (Dec. 18, 1995).

11/ BIS, "Central Bank Survey of Foreign Exchange and Derivatives Market Activity 1995" at Table 2-G.

fall within a statutory exclusion (such as the Treasury Amendment) or a regulatory exemption. *See* 7 U.S.C. §§ 2, 6(a) and (c), 6c(b).

In 1974, Congress substantially broadened the scope of the CEA by expanding the definition of commodity to include non-agricultural products. During Congress's consideration of the 1974 amendments, the Acting General Counsel of the Department of Treasury wrote to the Senate Committee on Agriculture and Forestry to express concern that, as a result of the proposed expansion of the CEA's scope, foreign currency transactions and transactions in other financial instruments that were then generally traded by large, sophisticated institutional participants would become subject to unnecessary regulation. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 51 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 5843, 5889. The Treasury Department also expressed concern that "new regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." *Id.* at 5888.

In view of these concerns, the Treasury Department urged that the proposed legislation be amended "to make clear that its provisions would not be applicable to futures trading in foreign currencies or other [specified] financial transactions." *Id.* at 5889. Congress adopted the Treasury Department's proposed statutory exclusion almost verbatim. That exclusion, which has since become known as the "Treasury Amendment," provides in relevant part:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. § 2(ii). The Senate Report offered the following explanation for including the Treasury Amendment in the CEA:

> A great deal of the trading in foreign currency in the United States is carried out through an informal network of banks and [dealers]. The [Senate] Committee believes that this market is more properly supervised by the bank regulatory agencies and that, therefore, regulation under this legislation is unnecessary.

S. Rep. No. 1131, 93d Cong., 2d Sess. 23 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 5843, 5863.[12/]

3. Regulatory Exemptions

As noted above, the CEA generally requires that all commodity options be traded on contract markets designated by the CFTC, unless such trading falls within a statutory exclusion such as the Treasury Amendment or a regulatory exemption. *See* 7 U.S.C. §§ 2, 6(a) and (c), 6c(b); 17 C.F.R. § 33.3. Two regulatory exemptions — the CFTC's trade option exemption and swap exemption — could possibly render OTC foreign currency options enforceable in the absence of the Treasury Amendment's statutory exclusion. Those regulatory exemptions, however, are significantly more limited in scope than the Treasury Amendment.

12/ Although Congress noted the regulatory supervision of banks participating in the OTC foreign exchange markets, Congress also was aware that other entities participated in that market (*see, e.g., id.* at 5888 (referring to the "foreign exchange markets for traders and investors")), and it included in the Treasury Amendment no provision restricting the amendment to activities or participants subject to federal regulatory supervision.

The CFTC's trade option exemption is limited to option transactions offered to a "producer, processor or commercial user . . . or . . . merchant" handling the underlying commodity, who enters into the transaction "solely for purposes related to its business as such." 17 C.F.R. § 32.4. This exemption offers a limited and uncertain degree of protection to a narrow group of market participants depending on the circumstances and purpose of the transaction. Similarly, the CFTC's swap exemption is limited to enumerated transactions, including currency options, that satisfy several criteria that restrict and introduce uncertainty concerning the availability of the exemption for foreign currency option transactions. *See* 17 C.F.R. § 35.2(a)-(d).

By their very nature, moreover, regulatory exemptions are subject to the CFTC's jurisdiction and regulatory discretion. Indeed, the CFTC could decide to restrict the scope of those two exemptions even further or eliminate the exemptions altogether.[13/]

4. The Proceedings Below

The CFTC brought suit in the United States District Court for the Southern District of New York against petitioners (as well as two additional corporate defendants), charging them with fraud in violation of the CEA and the CFTC's regulations in connection with foreign currency option transactions. The CFTC moved the District Court to appoint a temporary equity receiver. In response to this

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13/ For example, the CFTC considered in 1994 narrowing the scope of its swap exemption by, among other changes, further restricting the category of participants eligible for the exemption. *See* CFTC Proposed Rules, *Section 4(c) Contract Market Transactions; Swap Agreements*, 59 Fed. Reg. 54,139, 54,150 (1994).

motion, petitioners argued that the District Court lacked subject matter jurisdiction because the Treasury Amendment deprives the CFTC of authority to regulate foreign currency options. The District Court granted the CFTC's motion, holding that it had sufficient jurisdiction to appoint a temporary receiver based on the Second Circuit's interpretation of the Treasury Amendment in *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242 (2d Cir. 1986). (*See* Pet. App. at 1b-6b.)[14/]

The Second Circuit affirmed the District Court's appointment of a receiver. The principal question, the Second Circuit stated, was whether the phrase "transactions in foreign currency" in the Treasury Amendment includes foreign currency options. 58 F.3d at 53 (Pet. App. at 5a). "If such options are included, then the exemption applies, and the options do not fall within the CFTC's jurisdiction." *Id.* The Second Circuit concluded, however, that it was bound by its prior decision in *American Board of Trade*, which held that the phrase "transactions in foreign currency" does not include options:

> Our reasoning [in *American Board of Trade*] was that an option was simply the right to engage in a transaction in the future, and, until this right matured, there was no exempt "transaction." The exercise of an option would constitute a "transaction in foreign currency," but the purchase or sale of the option itself would not be such a "transaction" under the Treasury Amendment.

Id. (Pet. App. at 6a).

The Second Circuit "acknowledge[d] that [its] interpretation of the phrase 'transactions in foreign currency' in

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[14/] Citations in the form of "Pet. App. at ___" are to the Appendix to the Petition for Writ of Certiorari.

American Board of Trade conflicts with that of the Fourth Circuit in *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d 966 (4th Cir. 1993), [*cert. denied*, 114 S. Ct. 1540 (1994)]." *Id.* at 54 (Pet. App. at 6a). The Second Circuit nonetheless felt constrained by its earlier decision, remarking that "[w]hatever doubts [it] may have about the interpretation given the Treasury Amendment in *American Board of Trade* . . . are not grounds for [its] declining to follow it." *Id.*

Summary of Argument

The Treasury Amendment excludes from the CEA's coverage all "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). As a matter of plain meaning, the phrase "transactions in foreign currency" is broad enough to include any transaction in which foreign currency is the subject matter. Regardless of whether that transaction is a spot, cash forward, future or option, so long as its subject matter is foreign currency, it is a "transaction[] in foreign currency" within the ordinary meaning of that phrase. The structure of the CEA and the Treasury Amendment taken in its entirety confirm that the phrase "transactions in foreign currency" should be construed consistent with its plain meaning.

The only issue before this Court is whether the phrase "transactions in foreign currency" includes foreign currency options. A decision by this Court that the phrase does include such options, however, does not mean that the District Court lacks jurisdiction. Although it appointed a temporary receiver, the District Court has not yet determined whether the underlying transactions were conducted on a "board of trade." If they were conducted on a "board of trade," then the transactions fall within the "unless" clause of the Treasury

Amendment, and thus are subject to the CEA despite the fact that they were "transactions in foreign currency." This action therefore should be remanded to the District Court for a determination of whether the transactions at issue were conducted on a "board of trade."

Argument

I.
The "Transactions in Foreign Currency" Clause of the Treasury Amendment Should Be Construed to Include All OTC Foreign Currency Transactions, Including Option Transactions.

On its face, the language of the Treasury Amendment is broad and unqualified, excluding from the CEA's coverage all "transactions in foreign currency" unless they involve sales "for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). The Industry Associations respectfully submit that the phrase "transactions in foreign currency" encompasses all OTC foreign currency transactions, including foreign currency option transactions.

A. The Plain Meaning of the Phrase "Transactions in Foreign Currency" Includes All Transactions in Which Foreign Currency Is the Subject Matter, Including Foreign Currency Options.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, the language of the statute itself excludes from the coverage of the CEA, without limitation or qualification, all

"transactions in foreign currency," unless such transactions involve sales "for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). As a matter of plain meaning, the phrase "transactions in foreign currency" is broad enough to encompass any transactions in which foreign currency is the subject matter. Indeed, the CEA uses the term "transaction" to define both "futures" and "options,"[15/] and the Treasury Amendment's plain language literally embraces both kinds of "transactions." When it enacted the Treasury Amendment, Congress simultaneously was conferring on the CFTC broadened jurisdiction over both commodity futures and options; Congress could have, but did not, carve out options from the unqualified term "transactions in foreign currency."

When the language of the statute is clear, as it is here, there is no need to rely on legislative history. Even if the Court were to review the legislative history of the Treasury Amendment, however, there is no "clearly expressed legislative intention to the contrary," and accordingly, the clear language of the statute must be accepted as conclusive. Far from revealing a clearly expressed legislative intention to the contrary, the legislative history of the Treasury Amendment confirms that the phrase "transactions in foreign currency" should be read broadly to encompass a wide range of transactions in the enumerated instruments, including options. For instance, the Treasury Department wrote in its letter to the Senate Committee that

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15/ Futures are "*transactions* involving contracts of sale of a commodity for future delivery," and options are "any *transaction* which is of the character of, or is commonly known to the trade as, an 'option.'" 7 U.S.C. § 2(i) (emphasis added).

> the Department is concerned that the language of the bill is broad enough to subject to regulation [by the CFTC] a *wide variety of transactions involving* financial instruments, such as puts and calls, warrants, rights, resale of installment loan contracts, repurchase options in Government securities, Federal National Mortgage Association mortgage purchase commitments, futures trading in mortgages contemplated by the Federal Home Loan Mortgage Corporation, etc. . . . [W]e do not believe it is contemplated that the bills should regulate transactions in *financial instruments of that nature*.

S. Rep. No. 1131, 93d Cong., 2d Sess. 51 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 5843, 5889 (emphasis added).

The Second Circuit in *American Board of Trade* stated that foreign currency options are not transactions "in" foreign currency, but rather merely "involve" or "relate to" foreign currency, because they do not necessarily result in the actual delivery of currency. *See* 803 F.2d at 1248 ("an option to buy or sell foreign currency is not a purchase or sale of the currency itself and hence is not a transaction 'in' that currency, but at most is one that relates to the currency"). In this context, however, the semantic distinction between "in," on the one hand, and "involve" or "relate to," on the other, is meaningless. For example, Webster's New Ninth Collegiate Dictionary defines the word "in" as "indicat[ing] inclusion" and the word "involve" as "include." *See* WEBSTER'S NEW NINTH COLLEGIATE DICTIONARY 607, 637 (1987). Thus, had Congress instead used the word "involve," the meaning of the Treasury Amendment would be the same.

B. There Is No Principled Reason to Distinguish Between Foreign Currency Futures and Options.

As noted above, foreign currency options give the holder the right to purchase or sell foreign currency. Because foreign currency is the subject matter of the transactions, foreign currency options are "transactions in foreign currency." The lack of an obligation to exercise the option, and thus cause actual delivery of the foreign currency, does not change the subject matter of the option or make it a "transaction in" something other than foreign currency.

As a practical matter, the *American Board of Trade* decision's analysis of options misapprehends the nature of options and the integrated character of the OTC foreign exchange markets. The OTC foreign currency markets are a single, integrated market, in which the same participants engage in a range of transactions including both futures[16/] and options. Like futures, options directly convey foreign exchange risk, whether or not they are exercised. The holder of an option does not need to exercise an option to profit from it. In fact, an option does not even need to be "in the money" for the holder to profit from it. The holder instead can sell the option prior to maturity at a price reflecting intervening foreign exchange movements. In addition, the distinction between options and futures is not always clear in particular transactions, and options and futures are often entered into in combination with each other.

[16/] Participants in the OTC markets routinely refer to these transactions as forwards, without regard to whether they are futures or cash forward transactions within the meaning of the CEA.

Futures and options transactions are fundamentally similar in another important respect: both are agreements to make or take delivery at a future time. The parties to both OTC futures and options transactions are not required to fulfill their obligations by delivery and, in fact, commonly do not actually deliver the underlying currency. And neither the language of the Treasury Amendment nor its legislative history suggests that the applicability of this exclusion should depend on whether (or the likelihood that) the participants in the transaction make or take actual delivery of the foreign currency. Thus, if OTC foreign exchange options fall outside the Treasury Amendment, so too must futures, a result the Fourth Circuit properly rejected in *Salomon Forex* precisely because it would render the Treasury Amendment incapable of accomplishing the very purpose for which it was enacted. *See* 8 F.3d at 976.

C. The Treasury Amendment's Exclusion Must Apply to Foreign Currency Transactions Other Than Spot and Cash Forward Transactions.

The Chicago Mercantile Exchange and the Board of Trade of the City of Chicago — two exchanges designated as "contract markets" by the CFTC — have contended that the Treasury Amendment's exclusion applies only to spot and cash forward transactions which result in actual delivery of the currency, leaving all other foreign currency transactions subject to the CEA. As the Fourth Circuit held in *Salomon Forex*, 8 F.3d at 974-78, that contention is without merit for two reasons.

1. The Structure of the CEA Confirms That "Transactions in Foreign Currency" Should Be Read Broadly.

The structure of the CEA as a whole indicates that the phrase "transactions in foreign currency" is not limited to spot and cash forward transactions. The CEA has always regulated only commodity futures and options and never spot transactions or cash forwards.[17/] The CEA applies to "accounts, agreements . . . and transactions involving . . . contracts of sale [of a commodity] for future delivery." 7 U.S.C. § 2a(ii). And the CEA's so-called "forward contract exclusion" excludes cash forward transactions from the CEA's definition of "future delivery." *See id.* § 1a(11) ("The term 'future delivery' does not include any sale of any cash commodity for deferred shipment or delivery.").

Thus, when Congress added the Treasury Amendment in 1974, if it had wanted to exclude from the CEA only spot transactions and cash forwards in foreign currencies, no amendment would have been necessary. Cash forwards were already excluded from the CEA by the "forward contract exclusion," and spot transactions were already excluded because they do not involve contracts for "future delivery" of a commodity. It is an "'elementary cannon of construction that a statute should be interpreted so as not to render one

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17/ Although the CEA prohibits manipulation of commodity prices generally, *see* 7 U.S.C. § 13(a)(2), there is no basis even to suggest that the Treasury Amendment was enacted to circumscribe the CFTC's anti-manipulation authority with respect to cash market transactions. The complete absence in the legislative history of the Treasury Amendment of any reference (by Congress or the Treasury) to the CFTC's anti-manipulation authority belies such a suggestion.

part inoperative.'" *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (quoting *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979)). Unless the Treasury Amendment is to be deemed wholly superfluous, it must be read to exclude from the CEA all OTC foreign currency transactions, and not just spot transactions and cash forwards.

2. The Treasury Amendment Taken in Its Entirety Confirms That "Transactions in Foreign Currency" Should Be Read Broadly.

If Congress meant for the phrase "transactions in foreign currency" to apply only to spot or cash forward transactions resulting in the actual delivery of the currency, then the Treasury Amendment's "unless" clause would be superfluous. Because the "unless" clause refers to "transaction[s] involv[ing] the sale [of a commodity] for future delivery," the general clause "transactions in foreign currency" must also include such transactions.[18/] In the words of the Fourth Circuit, "[t]he class of transactions covered by the general clause 'transactions in foreign currency' must include a larger class than those removed from it by the 'unless' clause in order to give the latter clause meaning." *Salomon Forex*, 8 F.3d at 975.

[18/] Although the CEA uses the phrase "contracts of sale of a commodity for future delivery" to refer to futures contracts, *see* 7 U.S.C. § 2(i), the Treasury Amendment's reference to transactions that "involve the sale [of a commodity] for future delivery" is clearly broader and, by any light, is broad enough to encompass options. Foreign currency options give the holder the right to require the purchase or sale of the currency on a date after the date on which the option is executed, and thus "involve" the sale of a foreign currency for future delivery.

In short, Congress would have had no reason to include the "unless" clause in the Treasury Amendment if it intended the phrase "transactions in foreign currency" not to include foreign currency futures. "[A] statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

If the phrase "transactions in foreign currency" includes futures contracts, it also must include foreign currency options. As the Fourth Circuit recognized, there is no principled reason to distinguish between foreign currency futures and options:

> Once we conclude that the clause is to be read broadly to include futures, it is a short step to conclude that the Treasury Amendment applies to *all* transactions in which foreign currencies are the subject matter, including options. Since trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context.

Salomon Forex, 8 F.3d at 976 (emphasis in original).

D. An Option Is a "Transaction[ ] in Foreign Currency" Regardless of Whether the Option Is Ultimately Exercised.

In *American Board of Trade*, the Second Circuit held that "[a]n option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a 'transaction[ ] in' that currency

unless and until the option is exercised." 803 F.2d at 1248.[19] The notion that a foreign currency option is not a "transaction[] in foreign currency" unless and until the option is exercised is premised on a misunderstanding of the economic substance of options. As noted above, options contracts directly convey foreign exchange risk regardless of whether they are ultimately exercised.

A rule that makes the applicability of the CEA depend on whether an option is exercised also would in effect allow unpredictable market forces and the discretion of the option holder to determine the legality of a transaction. The holder of an option anticipates and intends the exercise of the option (and delivery of the currency) if the option is "in the money" — in other words, if the exercise of the option will result in a positive cash flow to the holder of the option. Whether the exercise of the option will result in a positive cash flow will depend on movements in the price of the underlying foreign currency over the life of the option, which of course are unpredictable when the option is purchased.

It thus makes no sense to differentiate between exercised and unexercised options in applying the Treasury Amendment and to let the fact of delivery of the currency determine whether an option transaction is excluded from the CEA.

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[19] Prior to the Second Circuit's decision in this case, the members of the Industry Associations regarded this language as dictum because it was not necessary to the decision in *American Board of Trade*. As the Second Circuit remarked in this case, "we could have altered our reasoning and reached the same result by stating that because the instruments at issue in *American Board of Trade* were traded on an exchange they fell outside the Treasury Amendment." 58 F.3d at 53 (Pet. App. at 6a).

Such a rule would mean that the legality of a foreign currency option, which would depend on intervening foreign exchange movements and the discretion of the option holder, may not be known until after the exercise date of the option or the delivery of the currency — a commercially unacceptable result. From a commercial perspective, foreign currency options are "transactions in foreign currency" because foreign currency is the subject of the transactions.[20]

II.
This Action Should Be Remanded to the District Court for a Determination of Whether the Underlying Transactions Were Conducted on a "Board of Trade."

If the Court concludes that the phrase "transactions in foreign currency" encompasses foreign currency options, the Court should remand the action to the District Court for a determination of whether the transactions in this case were conducted on a "board of trade." This determination by the District Court is necessary because the "unless" clause of the Treasury Amendment carves out of the amendment any transactions in the enumerated instruments that "involve the

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[20] Similarly, the fact that the purchaser of an option may offset or net the transaction, rather than accept actual delivery of the foreign currency, does not change the essential nature of the transaction. *See Board of Trade of City of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 248 (1905) ("[s]et-off has all the effects of delivery"). Moreover, this analysis and the language of the Treasury Amendment are equally applicable when an option agreement provides for a cash payment, rather than delivery of a currency, based on the value of the currency at the time the option is exercised.

sale thereof for future delivery conducted on a board of trade."

As noted above, the District Court has not yet determined whether any of the underlying option transactions were conducted on a "board of trade."[21/] The District Court instead simply stated that it was "sufficiently satisfied on the subject of jurisdiction" based on the Second Circuit's interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* to appoint a temporary receiver. (Pet. App. at 6b.) Because the issue of whether the option transactions in this case were conducted on a "board of trade" was not considered by the District Court or the Second Circuit or raised in the petition for writ of certiorari, it is not presently before this Court. Accordingly, this Court should remand the action to the District Court to make the factual findings necessary to make the "board of trade" determination.

The CEA defines "board of trade" as "any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment." 7 U.S.C. § 1a(1). If this definition were construed too broadly, every participant in foreign currency transactions could be deemed a board of trade, and the Treasury Amendment's exclusion for "transactions in foreign currency" would be rendered meaningless by the "unless" clause. As noted above, a court must "give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotation omitted).

21/ Petitioners filed a motion to dismiss the action for lack of subject matter jurisdiction, which is still pending before the District Court. (Pet. App. at 5b-6b.)

Certainly, government supervised banks and broker dealers and their affiliated dealing entities have never been — and should not be — considered "boards of trade." *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 23 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 5843, 5863-64. Instead, courts have interpreted "board of trade," primarily in the "bucket shop" or "boiler room" context, to extend beyond organized exchanges only in limited circumstances involving firms engaged in the mass marketing of standardized, non-negotiable commodity contracts to unsophisticated retail investors. *See, e.g.*, *CFTC* v. *Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 576, 581 (9th Cir. 1982); *CFTC* v. *Standard Forex, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,063, at 41,455 (E.D.N.Y. Aug. 9, 1993); *CFTC* v. *American Metal Exch. Corp.*, 693 F. Supp. 168, 176-79, 193 (D.N.J. 1988), *aff'd in part and vacated in part on other grounds*, 991 F.2d 71 (3d Cir. 1993); *CFTC* v. *National Coal Exch., Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,424, at 26,049-50 (W.D. Tenn. Apr. 2, 1982).

Thus, a holding by this Court that the phrase "transactions in foreign currency" includes foreign currency options does not mean that the mass-marketing of those instruments to the general public will not be subject to the CEA. If such OTC foreign currency option transactions are conducted on a "board of trade," they can be policed by the CFTC to the same extent that OTC foreign currency futures are.[22/]

22/ In the case of the government securities markets, the Securities and Exchange Commission has authority to regulate trading in securities and options on securities. *See* 7 U.S.C. § 2a(i); 15 U.S.C. §§ 77b(1), 78c(a)(10).

Conclusion

The OTC foreign currency markets are a critical element in the continued development and viability of global markets and international commerce. Given the tremendous size and importance of these markets to the United States economy and the disruption that would be caused if OTC foreign currency transactions were subject to the CEA, the Industry Associations respectfully urge that this Court reverse the Second Circuit's decision that the transactions at issue were not "transactions in foreign currency" and remand the action to the District Court to determine whether the transactions were conducted on a "board of trade."

Respectfully submitted,

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No. 95-1181 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN and DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION, DELTA OPTIONS, LTD. and NOPKINE CO., LTD.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CRÉDIT LYONNAIS, BANK JULIUS BAER & CO. LTD., THE CHASE MANHATTAN BANK, N.A. AND SOCIÉTÉ GÉNÉRALE, AMICI CURIAE, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the "Treasury Amendment" (7 U.S.C. § 2(ii)) to the Commodity Exchange Act ("CEA") (7 U.S.C. § 1 *et seq.*)—which provides in pertinent part that "[n]othing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade"—exempts from regulation under the CEA *off*-exchange foreign currency options.

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption.*

* Filed herewith are the consents both of petitioners and respondents to the filing of this *amicus* brief.

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STATEMENT OF INTEREST

Amici are all banks with offices or branches in major money-centers, including New York. All are active, world-wide participants in the over-the-counter ("OTC") foreign currency market. This market is not an organized exchange. Rather, it is an informal, private, telephone and electronic marketplace of commercial and investment banks, foreign

currency brokerage companies, corporations, pension and mutual fund managers, cash managers, insurance companies, governments, and central banks whose activities regularly involve foreign currency trading. Trading is conducted twenty-four hours a day with quotations available globally on computer screens and by telephone. The Federal Reserve Bank of New York (on behalf of the United States), foreign central banks and foreign governments utilize this OTC market to implement policies relating to their currencies. This market also facilitates access to international markets for goods and services by providing the foreign currency necessary for transactions worldwide.

In this market, dealers, such as *amici*, and other participants make large transactions in virtually all currencies. These transactions are all privately negotiated and settled, typically by telephone or computer.

Integral to this vast market are currency options, in which *amici* also deal. An option provides the right, but not the obligation, to purchase or sell currency in the future. When traded on organized exchanges, currency options are standardized contracts in which a limited number of currencies and option terms are offered. By contrast, the terms of off-exchange options are freely negotiable, can be denominated in any currency, and are customized by the parties to suit their particular circumstances. *Daily* volume of off-exchange currency options in April, 1995 was estimated to be $40 billion[1] and is widely believed to have increased since that date. Many times more currency options are traded in privately negotiated, OTC transactions than on organized exchanges (*Id.*). This clear preference for trading currency options off-exchange is explained by the flexibility of terms, ease of participation and superior liquidity of that market.

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[1] Fed. Reserve Bank of N.Y., Survey of Derivative Markets Activity, at Table 5 (Bank for International Settlements December 18, 1995).

As active participants in the OTC currency market, *amici* are greatly concerned by the decision below. If affirmed, it would subject off-exchange trading in currency options to regulation under the Commodity Exchange Act (the "CEA"). Affirmance would result in significant costs to market participants such as *amici*,[2] enormous uncertainty over the enforceability of billions of dollars of outstanding currency options contracts and competitive advantages to market participants in other parts of the world who could trade beyond the reach of the CEA.

Amici are also interested parties because they and petitioners William Dunn and Delta Consultants, Inc. ("Dunn/Delta") have been named as defendants in related civil litigation now pending in the United States District Court for the Southern District of New York.[3] That litigation was brought by purchasers of investment contracts in a hedge fund operated by Dunn/Delta (the "Fund"). The Fund allegedly traded foreign currency options with, among others, *amici*. The plaintiff investors have alleged that *amici* violated the anti-fraud provisions of the CEA.

Amici Crédit Lyonnais and Bank Julius Baer moved to dismiss the investors' CEA claims on the ground, among others, that the CEA does not apply to the foreign exchange trading activities alleged in the investor complaints. As the Petition

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[2] Those costs include incurring the expense of registration and compliance that attend CFTC regulation, meeting capital requirements imposed by the CEA, being forced to trade on a CFTC designated exchange and being exposed to private rights of action under the CEA.

[3] *Amici* were all originally named as defendants in *Sundial Int'l Fund* v. *Delta Consultants*, 94 Civ. 118 (TPG). Subsequently, claims against *amicus* The Chase Manhattan Bank, N.A. were dismissed without prejudice. *Amici* Crédit Lyonnais and Bank Julius Baer are also defendants in companion suits entitled *Musashi Ltd.* v. *Delta Consultants*, 95 Civ. 3773 (TPG) and *Mablyn Investments Ltd.* v. *Delta Consultants*, 95 Civ. 3774 (TPG).

raises that very issue, *amici* are keenly interested in its disposition.[4]

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the CEA, Section 2(a)(1)(A)(ii), codified at 7 U.S.C. § 2(ii), provides as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the Petitioners' Brief.

SUMMARY OF ARGUMENT

The words "transactions in foreign currency" plainly include foreign currency options. The obvious meaning of these words is confirmed by the specific and repeated subclassification of "options" within "transactions" in the statutory description of CEA jurisdiction.

The Second Circuit held that options are not "transactions in foreign currency" unless and until they are exercised. Making jurisdiction depend on whether options are exercised results in an unpredictable and unprincipled jurisdictional boundary and cannot be what Congress intended. Moreover, in treating options differently than futures, the Court of Appeals' interpretation disregards practical economic reality. Futures are economically indistinct from certain arrangements of options. Just as futures are unquestionably "transactions in foreign currency," so are options.

A decision by the Court that the Treasury Amendment includes options will not leave retail investors unprotected. Ample protection is provided by the securities laws, other statutes and the common law.

The so-called "Trade Option" and "Swap" exemptions issued by the CFTC do not adequately insulate off-exchange currency markets from the adverse effects Congress sought to eliminate by enacting the Treasury Amendment. The two exemptions improperly limit the Treasury Amendment's broad exclusion and, as complex regulations subject to CFTC interpretation or withdrawal, do not offer the certainty and clarity of the Treasury Amendment's plain language.

ARGUMENT

I. The Treasury Amendment Plainly Excludes Foreign Currency Options from the CEA's Jurisdiction.

The plain meaning of the Treasury Amendment is that all transactions, including options, which have foreign currency as their subject are exempt from the CEA. The Court of Appeals decision is a dramatic departure from the "plain meaning" principles of statutory construction which the Court has mandated. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordi-

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[4] As against the bank defendants, the district court has limited the CEA claims and dismissed certain non-CEA claims. *See Sundial Int'l Fund* v. *Delta Consultants*, 923 F. Supp. 38 (S.D.N.Y. 1996). Reversal of the decision below would require dismissal of the remaining CEA claim.

narily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

The Treasury Amendment excludes from the Act's coverage, *inter alia*, all "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." This is broad language. However, the decision below reads the Treasury Amendment very narrowly. Without elaboration or enthusiasm, the Second Circuit simply deferred (58 F.3d at 53) to its earlier opinion in *CFTC* v. *American Bd. of Trade*, 803 F.2d 1242 (2d Cir. 1986), which briefly concluded that an option to purchase or sell foreign currency does not become a transaction in that currency, and thereby exempt from the CEA, "unless and until the option is exercised" (*Id.* at 1248).[5]

The Second Circuit's view conflicts with the sweeping dimension of "transactions" in the CEA and violates "the normal rule of statutory construction [which] assumes that 'identical words used in different parts of the same act are intended to have the same meaning.' " *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986), *quoting Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). Quite simply, "options" are a subset of "transactions." For example, the CEA defines "options" to be "*transactions* which are of the character of, or are commonly known to the trade as 'options.' " 7 U.S.C. § 5 (emphasis added).

Similarly instructive is the CEA's jurisdictional section, the subparagraph immediately preceding the Treasury Amendment, which catalogues the commercial activities falling

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[5] The Court of Appeals intimated that it may have had "doubts . . . about the interpretation given the Treasury Amendment in *American Board of Trade*" but believed itself constrained to follow its earlier decision (58 F.3d at 54). That case (1) involved a self-styled "American Board of Trade" which sold options to private individuals on a hodgepodge of commodities ranging from plywood to platinum and (2) devoted barely three paragraphs to whether the Treasury Amendment applied to the few foreign currency options which had been traded.

within the CEA.[6] The word "transaction" is used in that listing to help define the word "agreement" to include "any transaction which is of the character of, or is commonly known to the trade as, an 'option' . . . " By classifying an "option" as a "transaction," the CEA includes options on foreign currency within the Treasury Amendment's reference to "transactions in foreign currency."

The Court of Appeals' interpretation also collides with the everyday meaning of the words "transactions in foreign currency." The Fourth Circuit has correctly termed that phrase "broad and unqualified." *Salomon Forex* v. *Tauber*, 8 F.3d 966, 975 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540, *reh'g denied*, 114 S. Ct. 2156 (1994).[7] To carve "foreign currency options" out of "transactions in foreign currency" inevitably leads to distortion and confusion. Even the CFTC has run afoul of the construction it now advocates. For example, in requesting public comment on applications from several

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[6] Sec. 2(a)(1)(A)(i) of the CEA, 7 U.S.C. § 2(i), states in pertinent part:

> The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraph (B) of this paragraph, with respect to accounts, agreements (*including any transaction which is of the character of, or is commonly known to the trade as, an "option"*, "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for a future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 19 of this Act. (Emphasis added).

[7] The Fourth Circuit's analysis of the Treasury Amendment in *Salomon Forex* was notably more thorough than that employed in either Second Circuit decision. The Fourth Circuit discussed at length the history and purpose of the CEA, the words of the Treasury Amendment and the Treasury Amendment's legislative history before concluding that "all off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA." 8 F.3d at 976.

exchanges for exemptions for certain exchange-traded futures and options contracts, the CFTC, in describing one aspect of the requested exemption, referred to "currency transactions (*including* but not limited to spot, forward, *option* and/or swap *transactions*)" (emphasis added).[8] This usage illustrates the broad meaning generally given "transactions." Surely, if options are "currency transactions" they must also be "transactions in currency."

II. The Jurisdictional Boundary Delineated in the Decision Below Cannot Be What Congress Intended.

The Court of Appeals' reading of the Treasury Amendment creates a perplexing and unworkable jurisdictional boundary. First, it makes CEA jurisdiction a function of the unforeseeable market forces which determine whether an option will be exercised. Second, it draws a distinction between options and futures which is wholly foreign to the CEA. Because options and futures share common elements and are substantially interchangeable from an economic perspective, there is no reason to treat them differently for jurisdictional purposes.[9]

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[8] Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,414, 43,415 (1993).

[9] *See* United States General Accounting Office, *Financial Derivatives: Actions Needed to Protect the Financial System* at 26-27 (May 1994):

> Forwards and futures are contracts that obligate the holder to buy or sell a specific underlying [commodity] at a specific price, quantity, and date in the future.
>
> * * *
>
> Option contracts, which can be either customized and privately negotiated or standardized, give the purchaser the right to buy (call option) or sell (put option) a specified quantity of a commodity or financial asset at a particular price (the exercise price) on or before a certain future date . . .
>
> Options differ from forwards and futures in that options do not require the purchaser to buy or sell the underlying. A purchaser will not exercise an option until the market price of the underlying is greater than the exercise price for a call option or less than the exercise price for a put option. Options that are not exercised expire with no value.

A. CEA Jurisdiction Must Be Predictable.

The first problem with the Second Circuit's decision is that participants in the foreign currency option market will never know if their activities will ultimately be governed by the CEA. Neither the purchaser nor seller of an option can know at the time of purchase or sale whether the option will be exercised. To decide that the CEA governs an off-exchange currency option "unless and until the option is exercised" is to make application of the CEA solely a function of (1) the market forces which determine whether the option has any value and (2) the financial judgment of the option holder. This shifting jurisdictional definition cannot provide the predictability necessary for a smoothly functioning market and cannot be what the Treasury Amendment means. If adopted, it will leave the CEA with jurisdiction over options which the holder deemed unprofitable and did not exercise, but exclude jurisdiction over options which were "in the money" and were, therefore, exercised.

The Treasury Amendment was intended to avoid "an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors" which the 1974 expansion of the CEA had otherwise threatened. S. Rep. No. 1131, 93rd Cong., 2d Sess. 49-51 (1974) *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888 ("Legislative History"). The Second Circuit's confusing jurisdictional boundary would have exactly that undesirable effect.

B. Options and Futures Are Equivalent for Purposes of the Treasury Amendment.

The second problem is that the jurisdictional boundary resulting from the Court of Appeals' decision affects options

differently than futures, thereby engrafting a distinction on the CEA which has little economic meaning and is inconsistent with the statute itself. Logic and economic reality demand that "transactions in foreign currency" include "futures" and, therefore necessarily, options.

By its terms, the CEA regulates neither commodity spot transactions nor forwards, both of which result in physical delivery. 7 U.S.C. § 1a. This is because the CEA was meant to address manipulation, speculation and other perceived abuses that may arise from futures and options trading. 7 U.S.C. § 5; *Salomon Forex*, 8 F.3d at 970, 971. To avoid being redundant and meaningless, the Treasury Amendment's jurisdictional exclusion must relate to something other than spot and forward transactions. The only remaining possibilities are futures and options.

The 1974 amendments to the CEA broadened the scope of "commodities" to be regulated under the Act to include specified agricultural products and "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(3). *Merrill Lynch* v. *Curran*, 456 U.S. 353, 365 (1982). No distinctions were made between futures and options for jurisdictional purposes. Both were made subject to the CEA. *See* 7 U.S.C. § 5. But for the Treasury Amendment, which was also added in 1974, foreign currency futures and options would be regulated by the CEA.

Under the CEA, foreign currency futures are unquestionably "transactions in foreign currency." *See* 7 U.S.C. § 5 ("*Transactions in commodities* involving the sale thereof for future delivery as commonly conducted on boards of trade and *known as 'futures'* are affected with a national public interest." (emphasis added)); CFTC Statutory Interpretation Regarding Trading in Foreign Currencies for Future Delivery, 50 Fed. Reg. 42,983 (1985) (Treasury Amendment's exclusion

applies to off-exchange currency futures transactions between "sophisticated parties.").[10]

Classifying "foreign currency futures" within "transactions in foreign currency" necessarily requires that options also be included. Both futures and options are instruments permitting suppliers, processors and distributors to transfer price risks to speculators willing to take the risk. Futures and options do not involve contemporaneous delivery of the subject commodity and often do not culminate in delivery. Both involve the purchase of a promise—a contract right—and only indirectly concern the underlying subject matter. *Salomon Forex*, 8 F.3d at 975. As the Seventh Circuit has pointed out, "it is almost always possible to devise an option with the same economic attributes as a futures contract (and the reverse)." *Chicago Mercantile Exchange* v. *SEC*, 883 F.2d 537, 543 (7th Cir. 1989) (citing the CFTC's arguments that options on securities should be regulated as futures), *cert. denied*, 496 U.S. 936 (1990). *See also Salomon Forex*, 8 F.3d at 975, 976; R. Kolb, *Understanding Futures Markets*, 594-610 (3d ed. 1991) (describing creation of "synthetic" futures positions by using combinations of options).

Hence, construing the Treasury Amendment to apply to futures transactions but not to options would achieve no meaningful result. It would simply invite the recasting of transactions previously characterized as "options" into new transactions awkwardly structured as "futures."[11] And, as

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[10] *See also* the Treasury Department's letter to the Senate Committee on Agriculture and Forestry, which prompted the Treasury Amendment. It "strongly urge[d] the Committee to amend the proposed legislation to make clear that its provisions would not be applicable to *futures trading* in foreign currencies . . ." (emphasis added). *Legislative History* at 5889.

[11] As is clear from the *amicus* brief of the United States in *Salomon Forex* (Appendix D to the Petition for a Writ of Certiorari), the Department of the Treasury and the Securities Exchange Commission construe the Treasury Amendment to exclude a broad class of currency transactions, including options, from the CEA. "[W]hether structured as

noted, it would draw a jurisdictional line between futures and options which has no statutory antecedent.

III. Barring the Claimed CEA Jurisdiction Will Not Leave Retail Investors Unprotected.

Contrary to the CFTC's claim, investors will still be adequately protected if the CEA is held not to apply to off-exchange trading of foreign currency options. Moreover, such policy arguments may not be considered when the language of the statute is clear. *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 1453-54 (1994). ("Policy considerations cannot override our interpretation of the text and structure of the [Securities] Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it."); *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.")

The SEC's clear jurisdiction over such fraudulent acts as were allegedly perpetrated by Dunn/Delta removes any concerns that reversal will leave an "enforcement gap." As the Court of Appeals noted, Dunn/Delta traded no options of any kind with the allegedly defrauded investors. 58 F.3d at 51. Rather, Dunn/Delta solicited money from investors, commingled the funds in order to trade foreign currency options on the OTC market[12] and memorialized the arrangement through an investment contract with investors.[13]

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a future contract or an option" the United States supported the district court's holding in *Salomon Forex* that "[a]ll transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA" (*Id.* at p. 16d).

[12] CFTC complaint at ¶¶ 11, 12; Joint App. at 6, 7.

[13] See Exhibits K and L to the Affidavit of Glenn Spann, dated April 5, 1994 in support of the CFTC's Application for an Ex Parte Restraining Order, certified record, item 2.

These contracts were prototypical securities well within the SEC's jurisdiction. Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), defines "security" to include "any . . . investment contract." "[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC* v. *W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Here, all of the characteristics of a security were met.

The SEC has not hesitated to exercise its enforcement jurisdiction over the sale of investment contracts to investors who believed, as with Dunn/Delta, that proceeds would be used in trading foreign currency. *SEC* v. *Bankers Alliance Corp.*, 881 F. Supp. 673 (D.D.C. 1995) (SEC enforcement action regarding program using investor funds for highly leveraged trading in foreign currencies and debentures); *SEC* v. *Clark*, S.E.C. Litig. Rel. No. 13169, 1992 SEC LEXIS 525 (February 18, 1992) (announcing permanent injunction entered against seller of unregistered investment contracts for purposes of trading foreign currencies on the interbank foreign currency market); *SEC* v. *Williams*, S.E.C. Litig. Rel. No. 13124, 1991 SEC LEXIS 2877 (Dec. 18, 1991) (announcing disgorgement order); *SEC* v. *Monex Int'l*, S.E.C. Litig. Rel. No. 7057, 1975 SEC LEXIS 959 (Aug. 25, 1975) (announcing permanent injunction). The securities claims of private litigants have also been sustained in these circumstances. *See, e.g., Wagman* v. *FSC Securities*, Fed. Sec. L. Rep. (CCH) ¶92,445 (N.D. Ill. 1985) (sale of "Caprimex Currency Hedge Accounts" was sale of security).

Even apart from the securities laws, fraud respecting currency transactions can be addressed by federal mail fraud (*see, e.g., United States* v. *Queen*, 4 F.3d 925 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 1230 (1994); *see also United States* v. *Brien*, 617 F.2d 299, 310 (1st Cir.), *cert. denied sub nom., Labus* v. *United States*, 446 U.S. 919 (1980)) and RICO

statutes (*United States* v. *Faulkner*, 17 F.3d 745 (5th Cir. 1994) (Ponzi scheme)), and by state law. 7 U.S.C. § 16(e) (preserving application of state statutes to transactions in commodities not conducted on a board of trade); *see In Re E.K. Capital Corp.*, No. 80-16C, 1980 Ill. Sec. LEXIS 96 (Ill. Sec. Dept. 1980); *Currency Trading Int'l* v. *Dept. of Banking and Fin.*, 1995 Fla. Sec. LEXIS 64 (Fla. Dept. Banking & Fin. 1995). In addition, private parties have a considerable array of statutory and common law claims which can be asserted. *E.g.*, *Bishop* v. *Commodity Exchange*, 564 F. Supp. 1557 (S.D.N.Y. 1983) (CEA did not preempt private causes of action under New York's Martin Act).[14]

What this case ultimately concerns is the CFTC's apparent desire to participate in the regulatory jurisdiction of other agencies when the Congress has specifically excluded it. The plain meaning of the congressional exclusion should be enforced.

IV. The CFTC's Trade Option and Swap Exemptions Conflict with the CEA and Will Not Eliminate Adverse Consequences of an Affirmance.

If, as the Second Circuit held, off-exchange foreign currency options are governed by the CEA, they are illegal and unenforceable if not traded in compliance with the CEA. Affirming that decision would undermine the global currency markets. The CFTC can be expected to argue that those markets are adequately insulated by reason of its "trade option exemption" and its "swaps exemption." Both are limited, however, and both can be withdrawn or reinterpreted by the

[14] Parallel to the CFTC's action against Dunn/Delta, investors who have sued Dunn/Delta have asserted many claims besides those under the CEA. These include violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, Section 20(a) of the Securities Exchange Act, Section 12(2) of the Securities Act, Section 15(a) of the Securities Act, RICO, RICO conspiracy, common law fraud, conversion, gross negligence, negligence and breach of contract. Dunn/Delta have not moved against any of these claims.

CFTC on short notice—an outcome Congress sought to avoid by enacting the Treasury Amendment. Congress intended and clearly stated that options are "transactions in foreign currency" and outside the CEA.

The trade option exemption, 17 C.F.R. § 32.4, exempts from CEA jurisdiction commodity options offered by a person who

> has reasonable basis to believe that the option is offered to a producer, processor, or commercial user of, or a merchant handling, the commodity . . . and that such producer, processor, commercial user or merchant is offered or enters into the commodity option transaction solely for purposes related to its business as such.

The purpose of this language "is to exempt the acquisition of a commodity option for a non-speculative purpose by a commercial enterprise engaged in transactions in physical commodities from the requirements of the [CFTC's] option regulations."[15]

How this exemption might apply to most foreign currency options traded in the OTC currency market is far from clear. Even if strictly non-speculative, off-exchange currency options transactions are exempt when engaged in by banks, other transactions by banks and options transactions generally by mutual funds, pension plans, insurance companies, corporations and other large market participants with billions of dollars in foreign currency exposure are not covered. Even the Court of Appeals only believed this exemption deflected warnings of dire consequences to the currency markets "to a degree." 58 F.3d at 54. *See also Bd. of Trade of Chicago* v. *SEC*, 677 F.2d 1137, 1144 & n.14 (7th Cir.) (exemption is a "limited exception[ ] for merchants in the underlying commodity during the course of their business") *vacated as moot*,

[15] Proposed Reissuance of and Amendments to Regulations Permitting the Grant, Offer and Sale of Options on Physical Commodities, 46 Fed. Reg. 23,469 (1981).

459 U.S. 1026 (1982); *see generally* Glisson, *United States Regulation of Foreign Currency Futures and Options Trading: Hedging for Business Competitiveness*, 8 J. Int. L. Bus. 405, 414-15, 430-31 (1987).

The CFTC may also suggest that the so-called "swaps exemption" affords market participants sufficient protection (17 C.F.R. § 35). However, the effect of that exemption is to limit the OTC foreign exchange market (contrary to the Congressional prohibition in the Treasury Amendment) by exempting only certain types of transactions (i) between "eligible swap participants," (ii) "not part of a fungible class of agreements that are standardized as to their material economic terms," (iii) with creditworthiness of any party having an actual or potential obligation under the swap agreement a material consideration and (iv) not "entered into and traded on or through a multilateral transaction facility."

Whatever ambiguity exists in "transactions in foreign currency" is as nothing compared to the complexities inherent in these exemptions. It is not too gloomy to predict that market participants forced to parse out these exemptions in order to avoid entering into illegal and unenforceable contracts will be strongly inclined to conduct their business elsewhere, to the detriment of the United States. That result would surely betray both the intentions of the Treasury Department in proposing the Treasury Amendment and the Congress in enacting it.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated: July 12, 1996

Respectfully submitted,

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No. 95-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN and DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHICAGO MERCANTILE EXCHANGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE CHICAGO MERCANTILE EXCHANGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to this Court's Rule 37, the Chicago Mercantile Exchange ("CME") respectfully submits this brief with the consent of the parties.

STATEMENT OF INTEREST

The Commodity Exchange Act ("CEA") and the regulations of the Commodity Futures Trading Commission ("CFTC") provide that all commodity futures contracts and virtually all commodity options must be traded on "contract markets" approved by the CFTC (unless specifically exempted from such requirement). Exchange traded futures and options contracts are subject to the CFTC's exclusive regulatory jurisdiction. 7 U.S.C. §§ 2, 6(a) and (c), and 6c(b); 17 C.F.R. § 33.3. The CME has been designated by the CFTC as a "contract market" under the CEA. 7 U.S.C. §§ 7 and 8. The CME pioneered foreign currency futures and options trading in the early 1970s and is designated as a contract market for many currency futures and options.

Congress found futures and options trading to be "affected with a national public interest . . . rendering regulation of such transactions imperative for the protection of such commerce and the national public interest." 7 U.S.C. § 5. Petitioners ask this Court to hold that a minor provision of the CEA—the "Treasury Amendment"—vitiates Congress' regulatory scheme. Petitioners' position is that a dealer may avoid the CEA and CFTC regulation by trading in its back office rather than through a regulated market. Any entity, no matter how unscrupulous or under-capitalized, would be free to oper-

ate as a dealer in options contracts and offer those instruments to any customer without complying with any of the regulatory dictates of the CEA that Congress found "imperative." 7 U.S.C. § 5. Further, because options and futures are generally interchangeable as an economic matter, judicial acceptance of petitioners' position would directly affect both options and futures contract markets.

Adoption of petitioners' position also would foster an unprincipled competitive disadvantage for exchange markets that are subject to costly regulation and would judicially sanction unregulated off-exchange markets in options that would continue to drain volume and liquidity away from the exchanges. The CME therefore has a substantial interest in the Court's decision. Adoption of the position argued by petitioners would eliminate the current statutory mandate that futures and options be traded on CFTC-approved markets or subject to CFTC regulatory exemptions. The CME urges this Court to affirm the position taken by the Second Circuit which joined the Seventh Circuit in reading the Treasury Amendment in accordance with its plain meaning and the public interests Congress has found to be served by the CEA.

STATEMENT OF FACTS

Futures and Options: Background and Regulatory Regime.

Futures and options contracts are instruments that are traded by parties seeking to hedge the risk of future commodity price changes or to speculate on those future

price changes. On exchanges today, over 95% of futures and options trading is done by market professionals, commercial businesses and financial institutions—not the general public. Futures and options generally are not used to transfer title to or ownership of a commodity, and for many purposes futures and options trading are equally viable economic alternatives. *See Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 543 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).

In a futures contract, the buyer (long) and seller (short) agree upon a price at which the future sale of a commodity will occur. In an option contract, the buyer (holder) and seller (writer) agree upon the price of the premium the buyer will pay to the seller for the right to buy or sell a commodity or a futures contract at a specified price on a specified date. In return for the premium, the option seller is obligated to sell or buy the commodity if the holder "exercises" his rights under the option.

As a practical matter, very few futures result in delivery and very few traded options result in delivery of a physical commodity. Instead, the parties to futures and options contracts typically offset their original contract to buy or sell a commodity at a future date, with a subsequent, corresponding sell or buy contract.

Early in this century, Congress considered banning futures trading and actually banned options trading for many years. *See* Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 Vand. L. Rev. 473, 477 (1988) ("Stein"); 7 U.S.C. §§ 6c(a)(B), 6c(c). Since futures and options provide hedging and price discovery benefits to the American economy, Congress has allowed futures and, over time, options to be traded, but only under the CEA and subject to exclusive CFTC jurisdic-

tion. 7 U.S.C. §§ 2 and 5. The CEA relies heavily on self-regulation by approved contract markets, 7 U.S.C. §§ 7 and 7a, subject to CFTC oversight. The CEA also prohibits fraud and manipulation, requires futures professionals to be registered, imposes limits on speculation, and contains many other regulatory safeguards. *See* 7 U.S.C. §§ 6a, 6b, 6d, 6e, 6f, 6k, 6m, 6o and 9.

Until 1992, Congress required all futures and virtually all options to be traded on CFTC-designated contract markets. 7 U.S.C. §§ 6(a), 6c(b) and 17 C.F.R. 33.3. In amending the CEA in 1992, Congress granted the CFTC the authority to exempt particular instruments from the contract market designation requirement provided that such an exemption was found to be in the public interest and consistent with the purposes of the CEA. *See* 7 U.S.C. § 6(c)(2). The CFTC has used that authority to exempt certain currency, interest rate and commodity swap agreements, and certain so-called "hybrid" transactions, from the contract market designation and most other CEA requirements. *See* 17 C.F.R. Parts 34, 35.

The 1974 CEA Amendments: Creating the CFTC and its Jurisdiction.

In 1974, Congress substantially strengthened the CEA. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 366 (1982). The 1974 amendments created the CFTC to exercise "exclusive jurisdiction" over futures and options under the CEA, thereby superseding any applicable jurisdiction of other federal agencies and preempting state regulation. 7 U.S.C. § 2; S. Rep. No. 1131, 93d Cong., 2d Sess. 19, 23 (1974).

The 1974 amendments also defined foreign currencies and government securities as commodities under the CEA and subjected futures and options involving those new "commodities" to the same regulatory structure as all other CEA-regulated commodities. *Id.* Congress recognized that unregulated currency futures were already being traded, yet expanded the "commodity" definition because it saw "no reason why a person trading in one of the currently unregulated futures markets should not receive the same protection afforded to those trading in the currently regulated markets." H.R. Rep. No. 975, 93d Cong., 2d Sess. 76 (1974). Congress knew that "markets in a number of foreign currencies" were among the "important futures markets" that were "completely unregulated by the Federal Government." S. Rep. No. 1131, at 19. Congress enacted the 1974 CEA Amendments "to fill all regulatory gaps—to regulate trading in futures and in options . . . because such trading is now poorly regulated, if it is regulated at all." 120 Cong. Rec. 34,736 (Oct. 9, 1974) (Remarks of House Conference Committee Chairman Poage); 120 Cong. Rec. 34,997 (Oct. 10, 1974) (Remarks of Senate Conference Committee Chairman Talmadge).

Statutory Exclusions from the CEA.

Since its inception, the CEA generally has had only limited application to contracts that result in immediate delivery of a commodity (cash or spot transactions) or to so-called forward contracts designed to allow commercial enterprises to transfer actual ownership of a commodity in the future. Forward contracts are carved out of the CEA's description of a futures contract ("contract for the purchase or sale of a commodity for future delivery," 7 U.S.C. § 6(a)) by a provision that states: "The term

'future delivery,' as used in this Chapter, shall not include any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 2.

When enacted in 1922, the forward contract provision was designed to apply to common commercial transactions in the agricultural commodities that were then the only commodities covered by the statute. Thus, the provision excluded contracts whereby a "farmer [would] sell part of next season's harvest at a set price to a grain elevator or miller." *CFTC v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 577 (9th Cir. 1982) (footnote omitted). Unlike futures, where offset is routine, "both parties to the [forward] contracts deal in and contemplate future delivery of the *actual* [commodity]." 680 F.2d at 578 (emphasis in original).

In the 1974 amendments to the CEA, Congress enacted a corollary exclusion—the Treasury Amendment. During the pendency of that legislation, the Treasury Department expressed concerns relating to the CFTC's jurisdiction over transactions in certain financial instruments—including currency and government securities—that became commodities under the expanded "commodity" definition in the pending bill. S. Rep. No. 1131, at 49-51. To address that concern, Congress provided (7 U.S.C. § 2) that:

> Nothing in this chapter [7 U.S.C. § 1, *et seq.*] shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

SUMMARY OF ARGUMENT

In effect, petitioners argue that in enacting the Treasury Amendment Congress wrecked the comprehensive regulatory framework it was constructing through the rest of the 1974 CEA Amendments by excusing options in foreign currency and other important instruments from the CEA's safeguards and regulatory costs. The plain language of the Treasury Amendment and the history of the 1974 CEA Amendments refute this argument.

The Court below and the Seventh Circuit have ruled that since the Treasury Amendment's exclusionary phrase encompasses only actual "transactions in" the listed commodities (7 U.S.C. § 2), it does not exclude from CEA coverage options which are derivative transactions designed for hedging or trading, rather than actual ownership of, for example, currency. This straightforward reading of the statutory language is also sound policy because interpreting the Treasury Amendment's statutory exclusion narrowly—especially given the fact that the CFTC's broad exemptive powers has allowed the CFTC to address the legitimate concerns regarding unnecessary regulation voiced by banks and certain other market participants—is preferable to judicially undermining the CEA's basic framework. Excluding all over-the-counter options trading in major commodities like currency and government securities from the CEA would be a major departure from the seventy-year history of the CEA.

Petitioners and the *amici* who have supported petitioners correctly state that the CEA should treat foreign currency options in the same manner as foreign currency futures. However, implicitly contradicting themselves, petitioners' argument actually entails that futures con-

tracts for foreign currency and the other instruments covered in the Treasury Amendment are subject to the CEA but options contracts for these commodities are completely outside the CEA's protections. As a matter of proper statutory interpretation and sound regulatory policy, the CEA should be held to regulate transactions in *both* options and futures contracts for foreign currency and the other instruments listed in the Treasury Amendment. Moreover, there is nothing unworkable or unreasonable about the Second Circuit's interpretation of the Treasury Amendment's treatment of foreign currency options.

Still further, Congress' implicit adoption in the 1982 and 1992 Amendments to the CEA of the Second and Seventh Circuits' holding that transactions in options are not "transactions in" the underlying commodities provides further grounds for affirming the Second Circuit in this case.

Finally, the Court should reject the holdings of *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1540 (1994), and reject an interpretation of the Treasury Amendment that would subject foreign currency futures and options to CEA regulation only if the transactions were entered into by small or unsophisticated investors. Even aside from the unworkability of making CEA jurisdiction depend on the sophistication of the transacting parties, there is no basis in the CEA for drawing such a distinction.

ARGUMENT

One must begin with the language of the statute. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Petitioners agree, but actually seek to rewrite the statute by focusing exclusively on the word "transactions" while ignoring the preposition "in" that modifies "transactions."

In the CEA, Congress did not employ the phrase "transactions in" a commodity to describe futures or options contracts; instead that phrase was designed literally to mean cash and forward contracts where delivery and therefore an actual transaction in the commodity is contemplated.

I. FUTURES AND OPTIONS ARE NOT "TRANSACTIONS IN" COMMODITIES.

The Treasury Amendment's key phrase limits its coverage to "transactions in" foreign currencies and the other listed instruments. The plain meaning of "transactions in" compels affirmance of the Second Circuit's decision. In common language one would not say that one had engaged in a currency transaction if one bought or sold the right to enter into a transaction. *Cf. Lavanthall v. General Dynamics Corp.*, 704 F.2d 407, 412 (8th Cir.), *cert. denied*, 464 U.S. 846 (1983) (under securities laws, purchases of stock options have no "transactional nexus" with underlying stocks). Certainly no one can deny that a word used in a statute must be construed in context and that prepositions and adjectives may change the meaning of a word or phrase used in a statute. *See Gustafson v. Alloyd Co.*, 513 U.S. ___, 115 S.Ct. 1061, 1069 (1995) ("a word is known by the company it keeps").

The Second and Seventh Circuits have held that, when read literally, the Treasury Amendment excludes only actual "transactions in" the enumerated commodities (here, foreign currency), not options and futures. *See CFTC v. American Board of Trade, Inc.*, 803 F.2d 1242 (2d Cir. 1986); *Board of Trade v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982). The Second Circuit concluded in *American Board of Trade*, 803 F.2d at 1248, that:

> an option to buy or sell foreign currency is not a purchase or sale of the currency itself and hence is not a transaction "in" that currency, but at most is one that relates to the currency.

This reasoning was adhered to in the decision below:

> Our reasoning [in *American Board of Trade*] was that an option was simply the right to engage in a transaction in the future, and, until this right matured, there was no exempt "transaction." The exercise of an option would constitute a "transaction in foreign currency," but the purchase or sale of the option itself would not be such a "transaction" under the Treasury Amendment. *CFTC v. Dunn*, 58 F.3d 50, 53 (2d Cir. 1995).

The Seventh Circuit reasoned similarly in *Board of Trade v. SEC*, 677 F.2d at 1154 in holding that the Treasury Amendment does not apply to the trading of government securities options:

> "The option transaction is a long step removed from a transaction in the commodity involved, since the option purchaser, if he or she does nothing more when the specified date arrives, will simply see the option die." *Commodity Futures Trading Commission v. American Board of Trade*, 473 F.Supp. 1177, 1183 (S.D.N.Y. 1979); see also *Commodity Futures Trading Commission & State of Georgia v. Sterling Capital Co.* [[1980-1982 Transfer Binder] Comm. F. L. Rep. (CCH) ¶ 21,169 at 24,783-24,784 (N.D. Ga.), *modified*, ¶ 21,170 (N.D. Ga. 1981).] Only when the option holder exercises the option is there a transaction in a government security.[1]

The distinction between transactions "in" commodities and derivative transactions that "involve" commodities goes to the heart of the CEA. Congress did not intend the CEA's entire regulatory scheme to apply to actual transactions in commodities—that is, transactions where title or ownership is transferred or is expected to be transferred. Rather, the CEA primarily regulates derivative transactions (futures and options) that involve commodities where the parties do not expect to and routinely do not transfer title to or ownership of the commodity. Futures and options are traded in order to hedge or speculate in future price changes in a commodity without the cost and expense of acquiring a commodity through transactions "in" the commodity.

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[1] The Seventh Circuit subsequently confirmed that, as with options contracts, "[t]rading [of futures contracts] occurs in 'the contract', not in the commodity." *Chicago Mercantile Exchange v. SEC*, 883 F.2d at 542. *See also Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582, 589-593 (7th Cir. 1984), (GNMA forward contracts that typically resulted in delivery excluded from the CEA by Treasury Amendment); *Bank Brussels Lambert, S.A. v. Intermetals Corp.*, 779 F. Supp. 741, 748-750 (S.D.N.Y. 1991) (cash market currency transactions excluded from CEA by Treasury Amendment); *CFTC v. Standard Forex, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,063 (E.D.N.Y. 1993) (foreign currency futures contracts not excluded from CEA by Treasury Amendment).

The Treasury Amendment itself evidences congressional appreciation and endorsement of that distinction. That provision excludes actual "transactions in" the listed commodities, while including within the CEA's purview derivative "transactions involv[ing]" those commodities for future delivery conducted on a board of trade. 7 U.S.C. § 2.

The Treasury Amendment's exclusion should be limited to cash and forward contracts in the listed commodities as the Second and Seventh Circuits have held. The Treasury Amendment was enacted by Congress only to assure the Treasury Department that the CFTC would not regulate spot and forward contracts in the instruments listed in the Amendment unless those transactions actually involved trading on a board of trade.

II. THE HISTORY, PURPOSE AND STRUCTURE OF THE CEA AND THE 1974 AMENDMENTS SUPPORT THE VIEW THAT THE TREASURY AMENDMENT DOES NOT EXCLUDE OPTIONS.

While the statutory language of the Treasury Amendment supplies more than adequate reason to affirm, the history and structure of the CEA also support affirmance.

First, the Treasury Department's much-cited letter to the Senate Committee in 1974 nowhere mentioned foreign currency options or any other options except repurchase options. Indeed, although the Treasury Department's letter referred loosely to the need to exempt "futures" in the listed commodities from the CEA and this terminology was used by the Senate Committee in paraphrasing the Treasury Department's letter, the key

congressional reports do not suggest that options or futures are among the excluded transactions. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 23 at 49-51.[2] Thus, the legislative history of the Treasury Amendment does not provide any evidence of congressional intent to exclude any options or futures contracts from the CEA.

Second, petitioners' reading of the Treasury Amendment conflicts with Congress' expressed intention in 1974 to fill all regulatory gaps in the marketing of options contracts and to subject previously unregulated options contracts to exclusive CFTC jurisdiction. Surely if Congress intended the Treasury Amendment to create new, large gaps in the CFTC's jurisdiction and leave whole categories of options contracts unregulated, Congress would have made that intent explicit. The congressional policy underlying the 1974 expansion of the CEA requires that options contracts not be excluded from that statute's coverage.

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[2] The Treasury Department's letter shows no awareness of the difference between futures and forwards and is thus consistent with an intent to exclude only spot and forward transactions from the CEA. Further, given the Treasury Department's use in the "unless" clause of the extremely broad, statutory-defined term "board of trade" in drafting the exclusion from the Treasury Amendment, it is impossible to determine what specific types of transactions the Treasury Department wanted to exclude from the CEA.

In any event, the issue here is not what the Treasury Department intended, but what Congress intended. The language adopted and the legislative history of the 1974 Amendments to the CEA demonstrate that Congress only intended to exclude spot and forward contracts.

Finally, as a general matter of statutory construction, statutory exceptions are to be strictly construed so that the exception does not swallow the rule. *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Petitioners would read the Treasury Amendment's exclusion to scrap the CEA's regulatory scheme for trading in the listed commodities thereby creating an unwarranted vacuum in statutory coverage and regulatory policy. That result would destroy the core of the CEA, at least for such important commodities as foreign currencies and government securities. Under petitioners' view of the CEA, con artists operating "bucket shops" would obtain a "safe harbor" for offering fraudulent off-exchange products in Treasury Amendment commodities without any fear that their misconduct would violate the CEA.[3]

Adoption of petitioners' argument also would defeat the CEA's emphasis on exchange self-regulation. *See* 7 U.S.C. §§ 7, 7a and 8 (requiring exchanges to police for price manipulation and to enforce their rules). It would also mean:

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[3] Congress required trading of options and futures on CFTC-designated contract markets in order to eliminate bucket shops, which were businesses that purveyed non-exchange traded futures contracts to investors through various forms of fraud and deceit. *See, e.g.*, 61 Cong. Rec. 1,318 (1921) (Remarks of Rep. Voight) (stating that "[t]he bucket shop is wiped out in this bill"); 132 Cong. Rec. S17,023 (Oct. 17, 1986) (Remarks of Sen. Melcher) (stating that the "mayhem" of bucket shops caused Congress to require all lawful futures to be traded on federally approved exchanges). *See also* Stein, 41 Vand. L. Rev. at 481-482.

- no antifraud rules, 7 U.S.C. § 6b; 17 C.F.R. 33.10;
- no record-keeping or audit trail requirements, 17 C.F.R. 1.35;
- no trade practice rules, 17 C.F.R. 1.38, 1.39, Part 155;
- no ban on manipulation, 7 U.S.C. §§ 7(d), 9;
- no CFTC registration requirements, 7 U.S.C. § 6d; 17 C.F.R. Part 3.

In short, adoption of petitioners' position would preclude all forms of CEA trading regulation for non-exchange options trading in the listed commodities.

III. PETITIONERS ARE CORRECT THAT OPTIONS AND FUTURES SHOULD BE TREATED SIMILARLY UNDER THE CEA BUT THAT REQUIRES HOLDING THAT THE CEA COVERS OFF-EXCHANGE FOREIGN CURRENCY OPTIONS.

Petitioners (Pet. Br. 14) and all their supporting *amici* admit that options contracts and futures contracts are very similar both in form and purpose and must be treated in a similar manner by the CEA. However, the construction of the Treasury Amendment advanced by petitioners and one of the two groups of *amici* in fact would mandate a sharp distinction in the CEA's coverage of options and futures involving the commodities listed in the Amendment. The other group of *amici* takes a position which is inconsistent with petitioners' in an unsuccessful effort to escape the self-contradiction petitioners' position entails.

Petitioners and *amici* Credit Lyonnais, Bank Julius Baer & Co. Ltd., Chase Manhattan Bank, N.A. and Societe General argue that options on foreign currencies

are outside the coverage of the CEA. But this means that options on foreign currencies would be treated entirely differently from futures on foreign currencies. Futures are generally covered by the CEA no matter how "transactions in" is interpreted because of the Treasury Amendment's "unless" clause. The "unless" clause undeniably excludes from the exclusion any transaction which involves the sale of a futures contract on a "board of trade." "Board of trade" is very broadly defined in the CEA as "any exchange or association . . . of persons who shall be engaged in the business of buying or selling commodity. . . ." 7 U.S.C. § 1a(1). Thus, it is clear that if petitioners had been selling foreign currency futures their activities would have been covered by the CEA.[4] By arguing that they should escape CEA coverage, petitioners are claiming the CEA treats foreign currency options differently from foreign currency futures.

Amici Foreign Currency Exchange Committee, New York Clearing House Association, Futures Industry Association, Managed Funds Association, and Public Securities Association apparently recognize that they cannot without self-contradiction claim both that options and futures are treated similarly by the CEA and that options on foreign currency are outside the CEA given that futures on foreign currency are certainly covered by the CEA if they are traded on a "board of trade." These trade association *amici* attempt to avoid their dilemma by claiming that both options and futures in the listed commodities fall under the Treasury Amendment and that both options and futures are subject to the "unless" clause (Foreign Exchange Committee et al. Brief at 22 n. 18). Consistent with this position, the trade association *amici* ask the Court to remand to the district court for a determination of whether petitioners' conduct involved transactions on a "board of trade."

[4] In *CFTC v. Co Petro Marketing Group Inc.*, 680 F.2d 573, 581 (9th Cir. 1982), it was held that "board of trade" as defined by the CEA was broad enough to include a corporation that was trading gasoline futures in an unregulated market. The CFTC has consistently taken the same broad approach in applying the definition of "board of trade." It has held that a sole proprietor operating a bucket shop could be a board of trade. *In re Stovall*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941 at 23,781 (CFTC 1979). *See also CFTC v. National Coal Exchange, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,424 at 26,053 (W.D. Tenn. 1982) (company operated "as a kind of board of trade"); CFTC Interpretive Letter No. 77-12, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,467 at 21,911-912 (Aug. 17, 1977) (government securities dealers may be a board of trade).

However, the "unless" clause simply does not mention options, and the trade association *amici*'s attempt to make it cover options has no basis in the text of the Treasury Amendment or the CEA. Moreover, adoption by the Court of the position taken by the trade association *amici* would not help petitioners or *amici*. It is clear that, given the very broad statutory definition of "board of trade," the activities of both petitioners and *amici* are subject to the CEA if options contracts are subject to the "unless" clause.

In fact, to reach the (correct) result that the CEA treats options contracts the same as futures contracts, it is necessary to hold that options transactions are not "transactions in" the underlying commodity. The Treasury Amendment excludes CEA coverage of contracts contemplating actual delivery of the underlying commodities but does not exclude coverage of either futures con-

tracts or options contracts. This is entirely consistent with the statutory language.

Finally, the argument made by petitioners that the Second Circuit's treatment of CEA jurisdiction over options is unreasonable or unworkable (Pet. Br. 14-15) is totally without merit. The Second Circuit's holding that foreign currency option contracts are subject to CEA jurisdiction does not require anyone to guess at the time of entering the option contract whether the option will be exercised to determine whether the option is subject to CEA jurisdiction. Under the CEA and the ruling by the Court below, option contracts on commodities are always subject to CEA jurisdiction whether they are ultimately exercised or not. In the exceptional case, in which the option is exercised, the exercise of the option would not retroactively remove CEA jurisdiction over the option contract.[5]

IV. THE 1982 AND 1992 AMENDMENTS TO THE CEA SUPPORT CEA COVERAGE OF FOREIGN CURRENCY FUTURES AND OPTIONS.

It is evidence that a statutory interpretation is correct that the interpretation has been brought to the attention of Congress and Congress has not sought to alter it while amending the statute in other respects. *See Atkins v. Rivera*, 477 U.S. 154, 166 n.10 (1986); *North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982);

[5] The treatment by the Court below of option contracts under the CEA is identical to the established treatment of futures. Futures contracts are subject to the CEA at the time they are made whether or not delivery is subsequently made under the contract.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394-95 (1982). Congress has twice considered practical problems allegedly created by narrow interpretations of the Treasury Amendment which resulted in broad CEA coverage of futures and options. In both cases, Congress carefully amended the law to address the problems that it found actually existed without amending the Treasury Amendment to exempt off-exchange options trading.

In 1982, legislation was enacted in response to the holding of *Board of Trade v. SEC*, 677 F.2d 1137, that the Treasury Amendment did not apply to options but only to transactions in the underlying commodities. Although it was dissatisfied with some of the practical results of the Seventh Circuit's holding, Congress did not tamper with the Seventh Circuit's interpretation of the Treasury Amendment. H. Rep. No. 97-626, 97th Cong., 2d Sess., Part I at 7-8. Instead Congress excluded from the CEA options on government securities (7 U.S.C. § 2a(i)) and options on foreign currencies if traded on a national securities exchange (7 U.S.C. § 6c(f)). The legislative history of the 1982 Amendments shows that Congress recognized that this would allow the CFTC to continue to regulate foreign currency options traded on commodities markets. H. Rep. No. 97-626, 97th Cong., 2d Sess., Part II at 12. Given the unaltered Seventh Circuit holding on the meaning of the Treasury Amendment, off-exchange foreign-currency options also remained subject to the CEA and CFTC regulation.

In 1992, in granting the CFTC authority to exempt specific instruments from the exchange-trading requirement, 7 U.S.C. § 6(c), Congress plainly acted with the understanding that prior to that amendment all futures contracts and almost all options were required to be

traded on CFTC-designated contract markets. If the Treasury Amendment had removed broad categories of options and futures products from the CEA and CFTC jurisdiction, Congress in 1992 would have cited that exclusion in determining whether the exchange-trading requirement was too rigid. Instead, the legislative history of the 1992 amendment to the exchange-trading requirement demonstrates the exact opposite. The 1992 amendment was designed to allow the CFTC to address in a careful and limited fashion some of the concerns of banks and other market participants which petitioners claim Congress addressed in a blunderbuss fashion with the Treasury Amendment. *See* S. Rep. No. 102-22, 102d Cong., 2d Sess. 17, 59-62 (1992); H.R. Conf. Rep. No. 102-978, 102d Cong., 2d Sess. 76-83 (1992).

The 1992 amendment also eliminated any basis for genuine concern that, absent a broad construction of the Treasury Amendment, the 1974 expansion of the CEA and CFTC jurisdiction could disrupt markets for foreign currency and other financial instruments already regulated by other federal agencies. To the extent that such markets actually involve the trading of options or futures contracts rather than only spot and forward contracts, the CFTC now has the power to exempt a market from any or all CEA regulation and even limit that exemption to those instruments that are subject to regulation by other federal agencies. In fact, in its hybrid exemption (17 C.F.R. Part 34), the CFTC only exempted those instruments that would be subject to regulation under federal securities or banking laws.

In sum, through its 1992 grant of exemptive authority to the CFTC, Congress established a specific mechanism that allows the CFTC to determine what level of regulation, if any, is appropriate for non-exchange futures trading. Adoption of petitioners' position would strip the CFTC of that power for foreign currency and government security options. That result is out of step with Congress' recent actions and should be rejected.

V. THE FOURTH CIRCUIT ERRED BY HOLDING IN *SALOMON FOREX* THAT THE TREASURY AMENDMENT EXCLUDES CATEGORIES OF TRADERS FROM THE CEA.

The Fourth Circuit in *Salomon Forex* erred in holding that options and futures contracts on foreign currency and other commodities mentioned in the Treasury Amendment are excluded from CEA coverage. *Salomon Forex* did not help matters by attempting to fix the huge regulatory hole its holding implied by suggesting that the CEA would still somehow protect small unsophisticated investors in foreign currency options when the language of the Treasury Amendment supplies no basis for *Salomon Forex*'s distinction in coverage between the sophisticated and novices.

In *Salomon Forex* the Fourth Circuit reasoned that because futures are mentioned in the "unless" clause that they must be covered by the Treasury Amendment and, because options are economically similar to futures, options too should be excluded for the CEA.[6] *Salomon*

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[6] The Fourth Circuit's reasoning based on the "unless" clause is flawed. Transactions in foreign currency (*i.e.*, cash and forward transactions) that are complex can involve a futures transaction and thereby be covered by the "unless" clause. The "unless" clause, then, excludes a subset of cash and forward transactions from the Treasury Amendment.

(continued...)

Forex was emphatic that there is "no principled reason" to distinguish between foreign currency options and futures. 8 F.3d at 974-76. The Fourth Circuit apparently overlooked the fact that the "unless" clause dictates that futures contracts in the commodities listed in the Treasury Amendment are generally covered by the CEA. Thus, if there is "no principled reason" to distinguish foreign currency options and futures, options should also be covered by the CEA.

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[6] (...continued)

The Fourth Circuit also believed that the Treasury Amendment was not limited in its reach to spot and forward contracts because that would cause it to be unnecessary in that it would overlap in part with the forward or "cash commodity" exclusion provided at 7 U.S.C. § 2. 8 F.3d at 975. But the 1922 enactment of the forward exclusion greatly predates that of the Treasury Amendment. Congress frequently passes provisions which are redundant of earlier enacted statutes, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("redundancies across statutes are not unusual events in drafting"), and it is hardly surprising that the Treasury Amendment was enacted even if it was somewhat unnecessary. The Treasury Department may well have not been aware that its concerns were unjustified given the forward exclusion. *See* Stein, 41 Vand. L. Rev. at 493. Further, it is not unusual for Congress to enact statutory provisions to prevent the courts from holding that an activity is covered by a law even when there is no particular reason to believe the courts will so interpret the law. For example, in the Soft Drink Interbrand Competition Act, 15 U.S.C. § 3501 *et seq.*, Congress precluded the courts from construing the Sherman Act to hold vertical territorial restraints in soft drink distribution *per se* illegal although this Court had held that vertical territorial restraints are not *per se* illegal in *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), before the Soft Drink Act was enacted. *See also* 15 U.S.C. § 4302.

Further, *Salomon Forex* overemphasized the vague language of the Treasury Department letter to the point of discarding the expressed will of Congress in the statute itself. Admittedly the legislative history of the Treasury Amendment reflects considerable confusion on the part of the Treasury Department.[7] However, the text of the Treasury Amendment, the text of the CEA generally, and the clear goals stated by Congress in passing the 1974 CEA Amendments all support holding that the Treasury Amendment excludes spot and forward contracts from CEA coverage unless the spot and forward contracts are involved in a futures transaction on a board of trade.

Salomon Forex was wrong to hold that the CEA does not cover foreign currency futures and options but also was wrong to attempt an *ad hoc* solution to some of the problems its holding created. The language of the Treasury Amendment makes no distinctions based upon the knowledge, financial sophistication, or other traits of the persons entering into the contracts in question.

Moreover, *Salomon Forex*'s approach to CEA coverage would require case-by-case judicial findings concerning the knowledge and sophistication of the participants in a transaction to determine whether the Treasury Amendment applies. It would also lead to the anomaly of otherwise identical transactions being subject to disparate regulatory treatment depending upon the identity of some of the counterparties. For instance, currency contracts sold by a dealer to certain importers could be excluded

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[7] This confusion undoubtedly resulted in part from the regulatory revolution that the 1974 CEA Amendments caused by expanding from traditional agricultural commodities to the new financial futures.

from the CEA, while identical contracts sold by the same dealer to other importers would be subject to the CEA. That kind of legislative line-drawing may be appropriate in the context of the CFTC's exemptive powers, which are regulations of general applicability where agency specificity may lessen legal uncertainty. But trying to read a fact-specific legal test into a statutory provision that never even mentions the identity of the parties to excluded transactions would be a recipe for heightened legal uncertainty that could curtail legitimate business transactions.[8] The approach adopted by the Fourth Circuit must be rejected as unprincipled and unworkable.

The Fourth Circuit's decision in *Salomon Forex* was influenced by the fears expressed by banks and others that a narrow interpretation of the Treasury Amendment threatened to undermine multibillion-dollar world-wide currency markets. 8 F.3d at 976. That Court was told that if the full scope of CFTC regulation was applied to those markets (the feared outcome of a narrow construction), U.S. banks and institutions would not be able to participate in those important currency markets. No one supports that result, but there is no reason to fear that

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[8] Some courts and commentators have suggested that the Treasury Amendment excludes only "otherwise regulated" futures and options, but that reading is unsupportable and unworkable. Nothing in the Treasury Amendment's language suggests that Congress contemplated excluding "otherwise regulated" futures and options from the CEA. Moreover, asking market participants and, ultimately, courts to determine whether various transactions are subject to various unknown statutes, both state and federal, and then determining whether those laws constitute sufficient regulation to make a transaction eligible for exclusion from the CEA would be a daunting and largely counter-productive task.

result given the 1992 amendment. If any transactions need to be carved out of any aspect of the CEA's regulatory structure, this Court should allow the CFTC to apply its exemptive scalpel to those transactions rather than adopt a meat-axe approach.

CONCLUSION

Adoption by the Court of petitioners' interpretation of the Treasury Amendment would have the potentially catastrophic result of allowing traders in over-the-counter options involving foreign currencies and the other instruments listed in the Treasury Amendment to avoid *all* regulation. This result is the opposite of what Congress sought to accomplish in 1974 when it extended the scope of the CEA and the jurisdiction of the CFTC.

Therefore, the Chicago Mercantile Exchange asks the Court to affirm the decision below.

Respectfully submitted,

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Dated: August 30, 1996

QUESTION PRESENTED

Whether the "Treasury Amendment" to the Commodity Exchange Act, which provides in pertinent part that "[n]othing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency" and in six other specified financial instruments, "unless such transactions involve the sale thereof for future delivery conducted on a board of trade," 7 U.S.C. § 2(ii), bars the Commodity Futures Trading Commission from bringing a judicial enforcement action arising from alleged fraud in connection with foreign currency option contracts.

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No. 95-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE BOARD OF TRADE OF THE CITY OF CHICAGO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Chief Justice Taft described the Board of Trade of the City of Chicago as "the greatest grain market in the world." *Board of Trade of the City of Chicago v. Olsen*, 262 U.S. 1, 33 (1923).[1] It has long served as a centralized market that provides critical price discovery and hedging functions for a cornucopia of agricultural commodities. By organizing the

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[1] Pursuant to S. Ct. R. 37.3(a), the parties have consented to the filing of this brief. Letters evidencing such consent are on file in the Clerk's office.

trading of futures contracts and options contracts on those futures, the Chicago Board of Trade provides the means for businesses to manage the risks they face from fluctuating commodity prices by facilitating arrangements with speculators who are willing to assume the risks that those businesses want to avoid. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357-59 (1982).

The "great annual flow" of commodities through the Chicago Board of Trade was at one time "made up of the cash grain sold on the exchange, the cash sales to arrive . . . and the comparatively small percentage of grain contracted to be sold in the futures market not settled by offsetting." *Board of Trade*, 262 U.S. at 33. In more recent times, the immense exchange business conducted there has broadened to encompass a large number of contracts that involve U.S. government securities. In 1995, for example, the Chicago Board of Trade was the venue for trading in approximately 162,000,000 futures contracts and options contracts on those futures involving government securities such as Treasury Bonds and Treasury Notes, which constituted about 75% of its business. The Chicago Board of Trade thus now provides businesses throughout the world and all types of financial enterprises, including pension funds, mutual funds and insurance companies, with the same critical price-discovery and hedging functions for those financial instruments that it continues to offer for agricultural commodities.

Each government security that is the subject of a futures contract is a "commodity" under the Commodity Exchange Act ("CEA"). 7 U.S.C. § 1a(3). The CEA regulates all trading in "commodity" futures contracts and options contracts on those futures, as well as options contracts on certain "commodities," including currencies. In general, the CEA requires all futures contracts and options contracts on those futures to be traded on "contract markets" that have been designated as such by the Commodity Futures Trading Commission ("CFTC"), subject to specific exemptions granted by the CFTC. 7 U.S.C. §§ 6(a), 6(c), 6c(b); 17 C.F.R. § 33.3. The Chicago Board of Trade has

been designated by the CFTC as a "contract market," and trading in the millions of futures contracts and options contracts involving government securities that are bought and sold on the Chicago Board of Trade is thus subject to the regulatory scheme provided in the CEA. 7 U.S.C. §§ 7-8.[2]

The Supreme Court's resolution of the issues of statutory construction raised in this case will settle the proper application of the CEA not only to transactions in options contracts involving foreign currencies, but also to futures and options contracts that involve each of the other financial instruments -- including U.S. government securities -- enumerated in the Treasury Amendment, 7 U.S.C. § 2(ii). The Court thus will decide whether dealers operating outside a regulated exchange will be permitted to evade the provisions of the CEA by selling futures and options contracts involving foreign currencies and government securities out of the dealers' own back offices rather than through the open and competitive facilities of a contract market where all facets of trading are subject to regulation by the CFTC. If petitioners' proposed redraft of the Treasury Amendment were to be adopted, the major product lines of the Chicago Board of Trade could be expropriated by off-exchange dealers and purveyed to the same customers the Board of Trade now serves, but without any government oversight or control, thereby greatly undermining the safeguards that Congress provided in the CEA. That result also would deflect many market users from continuing to trade on exchanges, robbing those markets of their liquidity and inflicting grave harm upon the Chicago Board of Trade's ability to continue to carry out its traditional functions of price discovery and risk management, to the detriment of the many businesses that rely upon it for these purposes.

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[2] The CFTC does not regulate options on "commodities" that are also defined as "securities" under the federal securities laws, such as options on government securities, and options on currencies traded on securities exchanges. 7 U.S.C. §§ 2a(i) & 6c(f); 15 U.S.C. §§ 77b(1) & 78c(a)(10).

For these reasons, the Chicago Board of Trade has a direct and immediate interest in the Court's resolution of the issues presented in this case.

INTRODUCTION

The provision of the Commodity Exchange Act at issue in this case, known as the "Treasury Amendment," follows the statutory grant of exclusive regulatory jurisdiction to the CFTC over "accounts, agreements . . . and transactions" involving futures contracts. *See* 7 U.S.C. § 2. Adopted in 1974, the Treasury Amendment excludes from the CEA and hence from the CFTC's jurisdiction "transactions in" seven specified financial instruments -- "foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments" -- "unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). To appreciate the proper scope of this provision, it is necessary to place it against the broader landscape of the federal laws governing trading in futures contracts, options contracts, and other similar means of hedging commodity prices.

Futures contracts and options contracts are instruments traded by parties that seek to hedge the risk of future commodity price changes or to speculate on those future price changes. While both instruments have a common purpose, they are structured somewhat differently. Futures contracts literally provide for delivery in the future of a commodity at an agreed price. In futures trading, however, delivery of the commodity rarely occurs. Generally, parties to futures contracts discharge their obligations by entering into an offsetting transaction before the contract matures, settling up any differences in cash. In contrast, when a buyer and seller actually intend to perform their contractual obligation to make or take delivery of the commodity at the contract's maturity -- where, for example, the seller is a farmer and the buyer is a grain dealer -- the contract

is known as a "forward contract." *See* T.A. Hieronymous, *Economics of Futures Trading* 31-32 (2d. ed. 1977).

An options contract is a more limited undertaking, at least from the perspective of an options purchaser. Unlike a futures contract, in which each party assumes an unconditional obligation to perform on the contract, the purchaser of an options contract does not incur any obligation to follow through on any later transaction in the underlying commodity. Instead, the options holder agrees to pay a premium in order to acquire a unilateral right to buy or sell a stated amount of the underlying commodity at an agreed price at a fixed point in the future. By contrast, for the party selling or writing the option, the technical contractual obligations are just like a futures contract. If the options purchaser decides to exercise the option, the options writer is obligated to perform by selling or buying the commodity at the price specified in the option. The distinct feature of an options contract is thus that its holder can limit the potential loss to the amount of the premium paid for the option (as compared to both parties to a futures contract and the party writing the option, who face a virtually unlimited risk from price fluctuations in the market). *See* G.L. Gastineau, *The Options Manual* 6-11 (3d. ed. 1988).

The aggregation of such futures and options trades in open, centralized markets provides important "price-discovery" information and hedging services for those who actually engage in buying and selling the underlying commodities. The central problem in regulating futures and options transactions is that though they can serve these public interests while also stabilizing commodity prices, they can also be misused to defraud customers and manipulate markets. In addition, futures and options contracts can be purveyed to unsophisticated members of the business community or the public with minimal cost, through "bucket shops" that are undercapitalized and often have no ability or intent to make good their obligations to their customers. Congress has noted that through the abuse of these instruments, the prices of the underlying commodities "can be manipulated, controlled, cornered or squeezed, to the detriment

of the producer or the consumer." 7 U.S.C. § 5. For three-quarters of a century, therefore, the federal agencies charged with enforcing these regulatory statutes have sought to preserve the beneficial functions of these risk-shifting instruments while limiting their potential for fraud and abuse.

The history of the CEA includes several major enactments. *See Merrill Lynch*, 456 U.S. at 355 n.1. The original Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187 (1921), restricted trading in both futures and options contracts. Grounded in Congress's taxing power, the law was invalidated in *Hill v. Wallace*, 259 U.S. 44 (1922). Reenacted immediately, under the commerce power, as the Grain Futures Act, Pub. L. No. 67-331, 49 Stat. 1491 (1922), this seminal legislation responded to reports of excessive speculation and price manipulations that were occurring on the unregulated grain futures markets. *See, e.g.*, S. Rep. No. 212, 67th Cong., 1st Sess. 4-5 (1921).

Through the provisions of the 1922 legislation, Congress sought to regulate and restrict trading in futures contracts, while allowing parties to enter into legitimate forward contracts of commodities for deferred delivery. This was accomplished by limiting trading in futures contracts to those entities formally designated as "contract markets," while crafting a statutory exception from this requirement for legitimate forward contracts that contemplated the sale or purchase of actual grain. *See* Pub. L. No. 67-331, § 2; *see also*, 61 Cong. Rec. 4762 (1921) (Sen. Capper).[3] All other trading in futures contracts was prohibited. Any such "off-exchange" contracts would be illegal and hence unenforceable in American courts. Congress also broadly prohibited manipulation of the price of both futures contracts and cash commodity

[3] The distinction between futures and forward contracts has been a constant point of uncertainty, since any futures contract not negated by an offsetting transaction would result in an obligation to take delivery of the underlying commodity. *See In re Stovall*, Comm. Fut. L. Rep. (CCH) ¶ 20,941 at 23,779-81(1979) (discussing origins of futures-forwards distinction).

transactions, provisions that remain in effect. *See* 7 U.S.C. §§ 9, 13(a), 13b.

In 1936, Congress remodeled the Grain Futures Act as the Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936). This legislation expanded the scope of federal regulation to include certain other agricultural commodities in addition to grain, and added further regulatory safeguards to govern futures trading. *See* CEA, §§ 2(a), 4a, 4b, 4d. Once again, however, Congress carefully excluded forward contracts from the "contract market designation" requirement in the CEA, rewording the existing exclusion to except "any cash commodity for deferred shipment or delivery." *Id.* § 2(a)(1). Congress also gave renewed attention to trading in options contracts, which it regarded as so riddled with fraud and unbridled speculation that it simply enacted an outright ban on all such transactions involving commodities covered under the CEA. *Id.* § 4c(a).

The next far-reaching overhaul of the CEA took place in 1974. *See* Pub. L. No. 93-463, 88 Stat. 1389 (1974). In this legislation, Congress created the CFTC as an independent regulatory entity vested with "exclusive jurisdiction" to regulate futures and options trading and, in particular, to enforce "the basic statutory prohibitions against fraudulent practices and price manipulation, as well as [to exercise] the authority to prescribe trading limits." *Merrill Lynch*, 456 U.S. at 365-66.

Of particular significance to this case, moreover, Congress again broadened the definition of "commodity" under the CEA. For the first time, this term was extended beyond agricultural products to encompass practically any kind of commodity imaginable, including all "goods and articles, except onions," as well as "all services, rights, and interests," as long as futures contracts are traded in those items. 7 U.S.C. § 1a(3). This expanded scope of the term "commodity" meant a greatly expanded regulatory authority for the newly created CFTC.

The expansion of this key definition raised new concerns about how to maintain the traditional framework of the CEA. For the first time, futures contracts in intangible items, including

various financial instruments, were brought within this statutory regime, which seemed greatly to expand the CFTC's responsibilities for preventing cash market manipulation.[4] In addition, the new definition of "commodity" called into question whether the traditional distinction between futures and forward contracts, which excepted actual delivery transactions, such as between farmers and grain elevators, from CEA futures regulation, *see supra* note 3, required clarification as applied to these novel kinds of "commodity," which were not "farmed" *per se*. The Treasury Amendment provided this clarification by specifying that "transactions in" seven specified kinds of financial instruments were not covered by the CEA, unless a transaction "in" any such item had resulted from a purchase or sale "involv[ing]" a futures contract. 7 U.S.C. § 2(ii).[5]

The treatment of options contracts in the 1974 amendments remained quite restrictive. The general prohibition on trading in options contracts involving commodities that had been regulated under the CEA before 1974 remained in place. Yet the CFTC was given authority to decide whether to regulate or prohibit trading in options contracts involving the newly listed commodities. *See* 7 U.S.C. § 6c(b) (1976 & Supp. II 1978). For several years, the CFTC tried simply to regulate options trading, but by 1978 it gave up, persuaded that "the offer and sale of commodity options has for some time been and

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[4] As Dr. Clayton Yeutter from the Agriculture Department pointed out to Congress, because "the act proscribes the manipulation of the market price in cash transactions of those commodities covered by the act," the "expansion of the definition of commodities" will result in "a corresponding expansion of such manipulation provisions relating to cash transactions." H.R. Rep. No. 975, 93d Cong., 2d Sess. 76 (1974).

[5] As explained in Section IB, *infra*, a letter from the Acting General Counsel of the Treasury Department, which provided a rationale for this proposed language, responded to concerns about language defining "futures contract" in the Senate Bill, which ultimately was not enacted, but which might have swept within its ambit a variety of transactions consisting of the actual purchase or sale of several different kinds of underlying financial instruments.

remains permeated with fraud and other illegal or unsound practices." 43 Fed. Reg. 16,153, 16,155 (1978). The CFTC thus adopted a regulation banning "the purchase or sale of any commodity option." 17 C.F.R. § 32.11. Congress later codified that prohibition on options trading, to extend until the CFTC documented its ability to regulate such transactions successfully. *See* Pub. L. No. 95-405, 92 Stat. 865, 867 (1978) (codified at 7 U.S.C. § 6c(c)) (Supp. II 1978).

Over the ensuing years, the CFTC gradually loosened the constraints on options trading, and Congress followed suit. *See* Pub. L. No. 99-641, 100 Stat. 3557 (1986). Options trading is now permitted to occur on designated "contract markets," subject to CFTC regulation. 7 U.S.C. § 6c(b); 17 C.F.R. § 33.3. The CFTC also has adopted the "trade option exemption," which exempts from much CFTC regulation, including contract-market designation, any commodity option "offered to a producer, processor . . . commercial user . . . or merchant . . . solely for purposes related to its business as such," 17 C.F.R. § 32.4. In this case, in particular, the court below noted that this regulatory exemption tends to deflect the "potentially dire effects" raised by petitioners' *amici* about the supposed effects of Congress's decision to subject trading in options contracts to regulation by the CFTC. Pet. App. 7a.

Finally, in 1992, Congress directly addressed those "potentially dire effects" by authorizing the CFTC to structure appropriate exemptions for transactions in futures and options contracts from contract market designation and other requirements of the CEA. 7 U.S.C. § 6(c). In 1993, the CFTC exercised its authority to exempt from much CEA regulation currency options traded among professionals and regulated institutions, subject to certain restrictions. *See* 17 C.F.R. Part 35.

SUMMARY OF ARGUMENT

1. The Treasury Amendment excludes from the CEA "transactions in" foreign currency and six other specified financial instruments. It does not employ the broader phrasing -- "transactions involving" these items -- used elsewhere in the statute to describe futures and options contracts, but instead employs the more precise and narrow phrase "transactions in" these items. The plain language of the exemption thus encompasses only those transactions where one of these financial instruments is the specific medium of the transaction, *i.e.*, where it *is* the item being transacted, but does not encompass the purchase or sale of futures or options contracts, which are not "transactions in" the underlying commodities. This is particularly true because several of the specified financial instruments are themselves species of "options contracts," which would make no sense if the phrase "transactions in" already covered all options contracts.

2. No other interpretation is consistent with congressional intent in enacting this provision, which was simply to clarify that the CEA's traditional distinction between futures and forward contracts would be maintained for the broader class of commodities that were now to be brought within the CFTC's jurisdiction by the 1974 amendments. And no other interpretation can be squared with the structure of the statute. In particular, petitioners' interpretation cannot be squared with the 1978 amendments to the CEA, which prohibited options trading altogether. Finally, even if the Court were to find the statutory language ambiguous, then the proper course would be to defer to the consistent interpretation given by the CFTC, which is the federal agency with sole authority to administer and enforce the provisions of the CEA. By contrast, the Treasury Department is in no different position here from any lobbying association that may propose language which is included in a statute, but does not by virtue of that fact gain any entitlement to judicial deference in its interpretation.

3. Petitioners' proposed redraft of the statute would undermine Congress's efforts to ensure orderly regulation and oversight of a broad spectrum of financial transactions. In enacting the CEA, and then later by broadening the definition of the kinds of "commodity" that are embraced within its coverage, Congress intended to establish a comprehensive regulatory scheme to protect the market integrity of futures trading, options trading, and cash transactions involving those commodities. Petitioners' interpretation would open enormous gaps in the CEA where the CFTC would have no authority to prevent undesirable conduct or manipulation of markets. In addition, the meritorious functions performed by such exchanges as the Chicago Board of Trade, whose activities have been found by Congress to be "affected with a national public interest," 7 U.S.C. § 5, would be crippled if futures contracts and option contracts involving currencies and government securities could be bought and sold in dealers' back offices in transactions that are not required to comply with the salutary provisions of the CEA.

4. Finally, petitioners' *amici* suggest that even though foreign currency option contracts should be excluded from the major clause of the Treasury Amendment, the Court should leave open on remand whether petitioners' unsavory activities are brought back under the statute by the minor "unless" clause. They thus ask the Court not to construe the language of the minor clause in deciding this case. This dubious maneuver should be rejected, for it unduly truncates the question on which the Court granted *certiorari*, is inconsistent with that *amici*'s own reading of the statute, conflicts with petitioners' position on this issue, and is simply wrong.

ARGUMENT

I. THE TREASURY AMENDMENT APPLIES TO "TRANSACTIONS IN" SEVEN SPECIFIED FINANCIAL INSTRUMENTS ONLY, AND NOT TO ANY OTHER KINDS OF TRANSACTIONS, SUCH AS THE PURCHASE OR SALE OF FOREIGN CURRENCY OPTION CONTRACTS.

Despite the complex history of the CEA, the narrow issue in this case is whether investments in foreign currency option contracts fall within the scope of the Treasury Amendment, adopted in the 1974 amendments. Any apparent difficulty in explaining this provision can be cleared away by use of the traditional tools of statutory interpretation.

A. The Plain Language of the Statute

The Court's consistent focus in recent years has been, first and foremost, on the plain language of the statute. *See, e.g., Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). The language at issue here is contained in the authorizing section of the CEA, which gives the CFTC "exclusive jurisdiction . . . with respect to accounts, agreements [including options contracts] . . . and transactions involving contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(i). The Treasury Amendment, which operates as an exclusion from the entire CEA, applies to "transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade." *Id.* § 2(ii).

The specific issue for decision here is whether the language "transactions in" these specified financial instruments encompasses options contracts that involve these underlying commodities. It plainly does not, for several reasons.

First, it is true of options contracts, as with futures contracts, that "[t]rading occurs in 'the contract,' not in the commodity." *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 542 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). As already explained, options contracts are not and typically do not result in an actual transaction "in" the underlying commodity. An option could only become a transaction in a commodity if it is subsequently exercised -- rather than being "offset" and thus settled in cash or merely allowed to expire, as commonly happens. On those occasions where an option is later exercised, the buyer of the option and the seller could be said at that juncture to engage in a transaction in the underlying commodity by making or taking delivery of it, but no such transaction occurs from mere trading in an "options contract" itself. For this reason, the "option transaction is a long step removed from a transaction in the commodity involved, since the option purchaser, if he or she does nothing more when the specified date arrives, will simply see the option die." *CFTC v. American Bd. of Trade*, 473 F. Supp. 1177, 1183 (S.D.N.Y. 1979), *aff'd*, 803 F.2d 1242 (2d Cir. 1986).[6]

Second, the language used in this statutory section as a whole bears out this understanding. The exclusive jurisdiction conferred on the CFTC is given with reference to three items -- "accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(i). "Options" are specifically referenced as a species of "agreements," thus signifying Congress's recognition that these transactions occur "in a contract," not "in the underlying commodity." By contrast, the major clause of the Treasury

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[6] By means of illustration, the Seventh Circuit has cogently observed that "'[n]either securities futures nor options on securities lead directly to new capital formation. American businesses raise capital by selling the securities underlying these futures and options; these businesses do not obtain any input of capital when investors purchase futures or options on these securities.'" *Board of Trade v. SEC*, 677 F.2d 1137, 1153 n.28 (7th Cir.) (internal citation omitted), *vacated as moot*, 459 U.S. 1026 (1982).

Amendment refers to "transactions in" the enumerated financial instruments, and this emphasis is echoed in the minor "unless" clause, which provides that the specified transactions are not excluded from the CEA when they "involve the sale *thereof* for future delivery," *i.e.*, the sale *of* the underlying commodity itself.[7]

Furthermore, it is clear that Congress used these terms advisedly. The narrower phrase "transactions in" these items differs from the broader phrase "transactions involving" specified commodities, used in contrasting manner elsewhere in the CEA to refer to futures and options contracts based on those commodities. *See* 7 U.S.C. § 6c(a) (unlawful to enter into "any transaction involving any commodity" used for hedging or determining the price basis of any "transaction in . . . such commodity" when such transaction constitutes a fictitious trade); *id.* § 13(d) (defining felony offenses relating to participation in "any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known in the trade as an "option"). Indeed, at the same time it enacted the Treasury Amendment, Congress employed the phrase "transactions involving" to describe those options contracts that would be subject to CFTC regulation. 7 U.S.C. § 6c(b).

This congressional distinction is also consistent with the dictionary definitions of these terms. *Compare* WEBSTER'S COLLEGIATE DICTIONARY 585 (10th ed. 1995) (defining "in" as indicating "inclusion . . . *within limits*") (emphasis added) *with id.* at 617 (defining "involve" as indicating "accompaniment"). And even if the matter were uncertain, as a proviso restricting

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[7] The Fourth Circuit alone has rejected this conclusion. *See Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994). It did so in part because of confusion about the structural provisions and legislative history of the CEA, which are discussed in Sections IB and IC, *infra*. Insofar as that court relied at all on the plain language of the statute, however, it went awry by improperly conflating the important distinctions between forward, futures, and options contracts, *see id.* at 975-76.

the statute's principal operation, any ambiguities in the scope of the Treasury Amendment should be narrowly construed. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 120 (1993) (favoring "tight reading of exemptions from comprehensive schemes of this kind").

This construction of the Treasury Amendment is also confirmed by a closer examination of the seven specified financial instruments, three of which are themselves species of "options contracts." *See* 7 U.S.C. § 2(ii) (listing "security warrants," "security rights," and "repurchase options"). If the preceding phrase "transactions in" already encompassed all options contracts involving these underlying commodities, it would have made no sense to list several kinds of options contracts in the limiting enumeration. It thus appears that Congress excluded only certain limited categories of options contracts from CEA regulation -- those expressly identified in the Treasury Amendment itself. Applying the established maxim "*expressio unius est exclusio alteris*," therefore, this provision cannot be read to encompass *all* options contracts involving these underlying commodities. *See, e.g., Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993). And any other reading would improperly relegate several of the listed terms to mere surplusage. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988).[8]

In sum, the plain language of the Treasury Amendment encompasses only those transactions where one of the listed financial instruments is the specific medium of the transaction, *i.e.*, where it *is* the item being transacted, but does not

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[8] The same analysis holds for the listed pair of terms "mortgages and mortgage purchase commitments." Since the latter is a kind of options contract on a mortgage, there would have been no need to include it in the list if "transactions in" were already understood to encompass options contracts.

encompass the purchase or sale of option contracts, which are not "transactions in" those underlying commodities.[9]

B. The Legislative History

The Court has cautioned parties that it will not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaff v. United States*, 114 S. Ct. 655, 662 (1994). In this case, petitioners' view of the Treasury Amendment relies on such materials to the point of inconsistency with the central purpose of the 1974 amendments as a whole.

In 1974, the two Chairmen of the Conference Committee on the legislation that included the Treasury Amendment underscored "the intent of the committees to fill in all regulatory gaps -- to regulate trading in futures and in options relating to commodities or commodity futures, because such trading is now poorly regulated, if it is regulated at all." 120 Cong. Rec. 34,736 (1974) (Rep. Poage); 120 Cong. Rec. 34,997 (1974) (Sen. Talmadge); *see also Point Landing v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 420 (5th Cir. 1986) ("Congress intended the 1974 amendments to 'fill all regulatory gaps' while 'avoid[ing] unnecessary, overlapping, and duplicative regulation'") (citation omitted), *aff'd on other grounds*, 484 U.S. 97 (1987). If the CEA were construed to exclude regulation of currency options, this would create an enormous hole in the regulatory net cast by the CEA, and would excuse trading in these options contracts from any effective regulatory safeguards.

This anomalous result would also clash with Congress's description of the Treasury Amendment as nothing more than a "clarify[ing]" provision. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 23 (1974). If Congress truly intended to remove all off-

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[9] Petitioners claim this construction "would lead to an unreasonable result -- since jurisdiction would be based on uncontrollable events in the future." Pet. Br. at 15. This bizarre claim is wholly incorrect, for the upshot is simply that no *options contracts* would be excluded from the CEA.

exchange trading in currency options, currency futures, and futures in government securities from regulation under the CEA, this would have worked a wholesale departure from the considered thrust of its expanded regulatory regime. Such a dramatic shift away from the direction of the 1974 amendments could hardly be dismissed as language that would simply "clarify" its regulatory safeguards, especially since Congress expressly intended in 1974 "that options not be traded except on organized exchanges and in conformity with the rules and regulations of the Commission." *Id.* at 26.

The most sensible explanation of this clarifying language is that it was included to make plain that the established distinction between agricultural forward contracts and agricultural futures contracts was not intended to be confused by the broadening of the definition of commodity to include intangibles such as a variety of financial instruments. Quite apart from the desire expressed in a letter from the Acting General Counsel of the Treasury Department to Senator Talmadge that certain futures trading in foreign currencies not be subject to regulation by the CFTC, *see id.* at 50 -- a desire that the Treasury Department continues to harbor today -- the language proposed in the Treasury Amendment responded to a different concern expressed in that same letter. This concern was over language contained in the proposed House and Senate bills, which defined the term "commodity" so broadly that it could have encompassed "transactions in" a variety of financial instruments, which usually occur "between large, sophisticated institutional participants." *Id.* at 51. One Senate bill of particular concern to Treasury would have defined a "futures contract" as "an agreement to buy or sell for delivery at a future time any specified quantities of goods, services, or other tangible or intangible things." *Id.* at 50.

The Treasury Department was correct that this language would have been unduly broad, including, for example, retail purchases of consumer goods for future delivery, agricultural forward contracts, and the sale of a security that is settled and delivered a few days in the future. In the end, therefore,

Congress opted to enact the House version of the legislation, which did not disturb the traditional forwards/futures distinction and, to "clarify" this point, adopted the Treasury language as well.[10] The CFTC's contemporaneous view thus explained that without this provision, "various sections of the [CEA,] as amended, would have given the CFTC jurisdiction over cash market manipulations of financial instruments for which a futures contract market had been designated." *SEC-CFTC Jurisdictional Correspondence*, Comm. Fut. L. Rep. (CCH) ¶ 20,117, at 20,831-41 (Dec. 3, 1975).

C. The Structure of the Statute

The Fourth Circuit alone has disagreed with this reading of the Treasury Amendment. It did so based on two points that it drew from an erroneous understanding of the structure and purpose of the statute. *See Salomon Forex*, 8 F.3d at 975.

The principal point relied on by the Fourth Circuit was that the CEA had always regulated "only futures and options and never spot transactions or cash forwards." *Id.* Thus, if the Treasury Amendment did not address futures and options contracts, but only the category of "cash market" transactions such as forward contracts, "no amendment would have been necessary," for this provision "can only have meaning if it is interpreted to exclude something more than that which was already excluded before it was enacted." *Id.*

This argument is flawed. As an initial matter, it reflects a mistaken view of the statutory regime. The CEA does *not* regulate *only* trading in futures and options contracts. It also contains various provisions applicable to cash transactions, *i.e.*, purchases and sales, with actual delivery, of the commodity itself. Although such transactions need not be conducted on a

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[10] Part of the muddled legislative history behind the Treasury Amendment is thus explained by the fact that it was directed in part to troublesome provisions in the Senate version of the bill, which were never enacted. It thus becomes more difficult to trace the import of its language for the law as finally enacted.

regulated exchange, the CEA imposes various prohibitions -- *e.g.*, on cornering, price manipulation, and false market reporting -- that apply to such transactions. 7 U.S.C. §§ 7, 9, 13; *see id.* § 6i (reporting requirement for cash transactions).

More importantly, this view issues from the infallible certainty of hindsight, and thus fails to recognize the situation at the time the Treasury Amendment was adopted. This provision was proposed as a measure to "clarify" uncertainty on this point that had sprung up anew in light of the expansion of the term "commodity" in the 1974 amendments to cover intangibles such as the great variety of financial instruments. *See* Section IB, *supra*. The whole notion of "cash market" transactions and "forward" contracts in intangible commodities, which had never been confronted before under the CEA, raised novel issues that Congress sought to clarify by specifying that the CFTC would not have authority to regulate "transactions in" the specific list of financial instruments enumerated in the Treasury Amendment. By insisting that this provision forcibly be given a distinct substantive meaning, rather than viewing it as what Congress said it was -- a mere clarifying measure -- the Fourth Circuit misunderstood its essential thrust and thus was obliged to depart from the plain language of the provision.

In addition, the *Tauber* court stated that the meaning of the exclusion contained in the major clause of the Treasury Amendment must be broader than the meaning of the subsidiary exception contained in the minor "unless" clause of that provision, for otherwise the minor clause would have no meaning. *Salomon Forex*, 8 F.3d at 975. Thus, since the court viewed the minor clause as reinstating CFTC regulation of futures trading in the specified instruments, the major clause must "reach beyond transactions in the commodity itself and to include all transactions in which foreign currency is the subject matter, including futures and options." *Id.*

Aside from the dichotomy between this construction and the plain language of the provision -- the court implicitly acknowledged that it read the major clause to "*reach beyond*" "transactions in [the specified financial instruments]," *id.* -- it

rests upon an erroneous view of the provision as a whole and of the relation between its two clauses.

The purpose of the Treasury Amendment as a whole was simply to "clarify" Congress's continued adherence to the consistent principles of the CEA. *See* Section IB, *supra*. Accordingly, the minor clause was designed to confirm that even though the major clause had excluded cash and forward transactions in the enumerated instruments from regulation under the CEA, the statute would still apply when those otherwise excluded transactions "involved" futures contracts conducted on a board of trade. In this regard, both the 1974 House and Senate committee reports discussed the futures delivery process where trades were "settled by an actual delivery." H.R. Rep. No. 975, at 149; S. Rep. No. 1131, at 17. Congress therefore was well aware that actual "transactions in" commodities could result from futures trading. If all actual transactions were excluded from the CEA, however, then the statute would not apply to the futures delivery process. Congress enacted the minor clause to "clarify" that it did not intend to create any such important gap in the CEA's coverage by retaining the CFTC's authority to regulate any "actual delivery" transactions in one of the enumerated financial instruments under a futures contract.[11]

The minor clause thus simply applied the CEA's basic principles to some of the new categories of intangible commodities now to be covered under the statute for the first time. Indeed, the Fourth Circuit's reading of the minor clause of the statute -- which suggested that "off-exchange" trading would be entirely freed from any regulation, while only trading

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[11] The wisdom of Congress's inclusion of the minor clause in this clarifying amendment was recently confirmed by a CFTC enforcement action in which the defendant was found to have attempted to corner the market in a particular government security through cash market transactions that were related to its futures trading account. Those improper cash market activities would have fallen outside the CEA entirely but for the minor clause, which applied because the activities involved futures contracts. *See In the Matter of Fenchurch Capital Mgmt., Ltd.*, No. 96-7 (CFTC July 10, 1996).

on a formal exchange would lie within the CFTC's jurisdiction -- would create the same errant incentives and problems of encouraging trading by undercapitalized "bucket shops" that the CEA has always been designed to prevent.

Finally, a critical shortcoming of petitioners' suggested interpretation of the Treasury Amendment is that it cannot be squared with later congressional modifications of the CEA. The most important of these, for purposes of this case, was the 1978 prohibition on trading in options contracts. In enacting this bar, Congress codified the previous ban that had been adopted by the CFTC. *See* 7 U.S.C. § 6c(c) (Supp. II 1978); 17 C.F.R. § 32.11. As explained earlier, the CFTC had arrived at that juncture after experimenting with the regulation of options trading for several years, based on its conclusion that "the offer and sale of commodity options has for some time been and remains permeated with fraud and other illegal or unsound practices." 43 Fed. Reg. 16,155 (1978).

If petitioners are correct that all trading in options contracts involving foreign currencies was not subject to CEA regulation in 1974, *then the 1978 ban on options trading could not have applied to non-exchange options trading in foreign currencies*. It is thus telling that the courts have held that trading in foreign currency options *was* barred by the 1978 ban, regardless of the Treasury Amendment. *See CFTC v. Sterling Capital Co.*, Comm. Fut. L. Rep. (CCH) ¶ 21,169, *modified by* ¶ 21,170 (N.D. Ga. 1981); *CFTC v. American Bd. of Trade*, 803 F.2d 1242, 1246-48 (2d Cir. 1986).

D. *Chevron* Deference

Finally, even if the Court were to find that the language of the Treasury Amendment is ambiguous as applied to the issues raised in this case, then the appropriate course would be to defer to the CFTC's reasonable interpretation of this provision of the CEA. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In this regard, the critical point is that the CFTC is the

federal government agency with sole authority to administer and enforce the provisions of this statute. *See, e.g.*, 7 U.S.C. §§ 1a(2), 2, 4a, 12a(5); *see also CFTC v. Schor*, 478 U.S. 833, 842-44 (1986) (referring to the "sweeping authority Congress delegated to the CFTC generally" to enforce the CEA). Congress delegates such authority to a particular agency when it recognizes that it cannot foresee and resolve all the problems that may arise in implementing the terms of the statute and thus confers upon the enforcing agency the responsibility to do so. *See Chevron*, 467 U.S. at 843-45.

By contrast, the Treasury Department's views on these matters are not entitled to deference here. Treasury is not the agency upon whom Congress has conferred the delegated authority to administer the statute, and thus to undertake "the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (internal quote omitted); *see also Adams Fruit Co. v. Barnett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1401 (1996) (courts "must respect the judgment of the agency empowered to apply the law to varying fact patterns") (internal quotes omitted). Indeed, Treasury is in no different position from any lobbying association which may propose specific language that is included in a statute, but does not by virtue of that fact gain any entitlement to judicial deference in its interpretation. *See Smiley v. Citibank (S.D.), N.A.*, 116 S.Ct. 1730, 1733 (1996) ("We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question . . . but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."). In addition, a more specific contextual problem looms: as the Seventh Circuit has noted, "We have no grounds to believe that the Senate

Committee adopted the opinion of the Treasury Secretary concerning the scope of the Treasury Amendment." *Board of Trade v. SEC*, 677 F.2d at 1154 n.34. It would thus be unfounded, as well as inappropriate, for the Court to prefer Treasury's views to those of the CFTC in interpreting this provision of the CEA.

The CFTC's contemporaneous construction of the Treasury Amendment, once again, is consistent with the reading given it by the court below. *See SEC-CFTC Jurisdictional Correspondence, supra*, at 20,831-41. As shown already, the CFTC's position is based on a reasonable -- and indeed -- correct interpretation. Because this is the CFTC's "contemporaneous interpretation of the statute it is entrusted to administer," which is both "eminently reasonable and well within the scope of its delegated authority," the Court must accord "considerable weight" to that position. *Schor*, 478 U.S. at 844.[12] In any case of statutory ambiguity, however, such deference is dispositive, for the Court has held that the responsible agency's "reasonable interpretation of the law . . . merits our approbation." *Holly Farms*, 116 S. Ct. at 1406.

II. PETITIONERS' PROPOSED REDRAFT OF THE STATUTE WOULD UNDERMINE CONGRESS'S EFFORTS TO ENSURE ORDERLY REGULATION AND OVERSIGHT OF A BROAD SPECTRUM OF FINANCIAL TRANSACTIONS.

Petitioners' proposed redraft of the statute also would undermine Congress's avowed efforts to ensure orderly regulation and oversight of a broad spectrum of financial

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[12] In addition, because Congress has explicitly conferred "exclusive jurisdiction" upon the CFTC to administer the provisions of the CEA, this case does not present the problems that arise from a "split enforcement" structure, whereby more than one agency is given functions to perform in administering a single statute. *See, e.g., Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151-52 (1991).

transactions. In enacting the CEA, and then later by broadening the definition of the kinds of commodities that are embraced within its coverage, Congress intended to establish a comprehensive regulatory scheme to promote market integrity in futures trading, options trading, and cash transactions involving those commodities. If the Court were to rewrite the Treasury Amendment along the lines sought by petitioners, enormous gaps would be opened where the CFTC would be unable to exercise any authority to prevent the manipulation of markets. *See* Section IB, *supra*.

In addition, the important functions performed by such established exchanges as the Chicago Board of Trade would be crippled if futures contracts and option contracts involving government securities and foreign currencies could be bought and sold in dealers' back offices in transactions that are not required to comply with any provisions of the CEA. Today, trading in futures contracts involving government securities and in options contracts on those futures constitutes approximately 75% of the daily volume on the Chicago Board of Trade. This trading could readily evaporate if over-the-counter dealers could offer the same futures and options contracts to the same customer base that the established exchanges now serve. Dealers could offer the same products on a much cheaper basis by evading the costs attendant upon federal regulation, while avoiding the safeguards that Congress established to deter manipulation of the underlying commodity markets.[13]

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[13] Futures contracts on government securities and options contracts on those futures are not themselves "securities" that are subject to regulation under the federal securities laws. As the result of an agreement reached by the Securities and Exchange Commission and the CFTC, legislation enacted in 1982 ensured that the CFTC would "continue to have exclusive jurisdiction over all permissible futures contracts based on exempted securities as well as options on those futures contracts," S. Rep. No. 384, 97th Cong., 2d Sess. 23 (1982), while the SEC "was expressly allocated jurisdiction over put and call options on exempt and non-exempt securities," H.R. Rep. No. 565 97th Cong., 2d Sess., pt. 2 at 8 (1982).

Some firms are engaging in this activity right now, having taken the position that the Treasury Amendment excludes all such trading from coverage under the CEA. The established exchanges already are paying a heavy competitive price for that statutory misreading. In 1995, the trading volume in over-the-counter derivatives, which either are or compete with futures contracts and options contracts, increased by nearly 60%. *See, e.g., OTC Fin. Transactions at Record Levels*, Fin. Times, July 11, 1996, p. 18. In contrast, in the first half of 1996, the Chicago Board of Trade's trading volume in government securities futures and related options declined about 7% from 1995 levels, and such trading in 1995 declined more than 9% from 1994 levels.

If that trend continues, the viability of the American futures exchanges and the public interests they serve will be in grave jeopardy.[14] Centralized exchange trading is, as Congress has determined, "affected with a national public interest." 7 U.S.C. § 5. These exchanges have been designed to provide liquid trading environments where contracts are entered into openly and competitively, without risk of a counterparty default. The trading that occurs on them provides reliable and accura[illegible] price discovery for a wide range of goods and instruments -- including government securities -- which many businesses use as a benchmark for everyday commercial transactions. If these traditional exchanges were to cease to exist, their central price-discovery function would be fulfilled on an episodic basis at best, resulting in a clear competitive advantage for those in our

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[14] By contrast, the "dire predictions" (Pet. App. 7a) raised by petitioners' *amici* if the Court were to confirm the Second Circuit's position -- already more than a decade old -- that options trading is subject to CFTC oversight and the safeguards contained in the CEA are vastly overstated. The CFTC already has confirmed that options transactions among commercial businesses and institutional and professional traders do not need to be traded on designated contract markets. *See* 17 C.F.R. § 32.4 and Part 35. In both cases, the CFTC retained its antifraud protections and certain other tailored safeguards. Petitioners' claim that mere prohibitions on fraudulent conduct will deter legitimate business activity is completely implausible.

economy with the resources to obtain far-flung pricing data at the expense of smaller businesses who will be dealing in the dark. Markets that had been well served by organized exchanges, including the market for government securities, will experience substantially greater price instability and volatility. In the context of government securities, that uncertainty will translate into broader price swings and higher interest rates that the government and ultimately the taxpayers would have to pay to finance our nation's debt.

Moreover, this Court is obliged to accept Congress's explicit legislative findings that regulation of trading in both futures contracts and options contracts is "imperative for the protection of" commerce in the underlying commodities and to protect "the national public interest." 7 U.S.C. § 5; *see Board of Trade*, 262 U.S. at 37-38. These congressional findings are incompatible with petitioners' claimed "regulation-free zone" for trading in futures contracts and options contracts involving such commodities as government securities and foreign currencies.[15] Allowing such futures contracts and options contracts to be marketed without basic federal protections against price manipulation, fraud, unfair pricing, and financial insecurity would, according to the congressional judgments embodied in existing law, endanger the essential public interests that the CEA was designed to promote and safeguard.

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[15] Even putting aside the detrimental competitive implications of that result, it would make no sense to leave off-exchange dealer markets in futures and options contracts unregulated, while heavily regulating the exchange markets in those same instruments, unless the dealer markets were much *less* risky than the exchanges. In fact, however, just the opposite is true, as the CFTC has explained. *See, e.g.*, 52 Fed. Reg. 47,022 (1987) (describing "safeguards" provided in exchange markets that are not generally available elsewhere).

III. CONSTRUCTION OF THE ENTIRE TREASURY AMENDMENT, INCLUDING BOTH ITS MAJOR AND MINOR CLAUSES, IS APPROPRIATE IN REACHING A RESOLUTION OF THIS CASE.

Finally, petitioners' *amici* suggest that even though foreign currency option contracts should not be understood to be covered by the principal clause of the Treasury Amendment, it would remain open on remand to consider whether petitioners' unsavory activities are covered by the minor "unless" clause, and thus are subject to regulation by the CFTC on that basis. They thus importune the Court not to construe the "board of trade" language of the minor clause in deciding this case. *See* Brief *Amici Curiae* of the Foreign Exch. Comm. in Support of Pet. at 25-27.

This dubious maneuver should be rejected, for four reasons. First, it represents an improper attempt to truncate the question framed by petitioners, on which the Court granted *certiorari* in this case. The Question Presented is "[w]hether the Treasury Amendment" *as a whole* -- both clauses of which are then quoted in the Question itself -- exempts trading in option contracts involving foreign currencies from the CFTC's jurisdiction. *See* Pet. at i. The Court has emphasized that it requires strict compliance with its rules governing the questions presented for review, *see, e.g., Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992), which address both what is fairly included and what is fairly excluded by the petition's statement. In particular, the Court's rules provide that the "statement of any question presented is deemed to comprise every subsidiary question fairly included therein," and only "the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R. 14.1(a). Unquestionably the "board of trade" issue is both explicitly "set out in the petition" *and* "fairly included" in the question presented.

Second, that *amici*'s own interpretation of the Treasury Amendment relies on their construction of the language contained in both clauses. *See* Brief of Foreign Exch. Comm.

at 22-23. They thus ask this Court to hamstring itself into a one-sided interpretive inquiry by artificially dividing up the intertwined parts of a single sentence -- drawing upon the second clause of the sentence where they believe it helps their position, but ignoring that same clause where they recognize that its construction would be disadvantageous to them. The neutral tools of statutory construction should not be converted into such a self-serving one-way ratchet.

Third, in any event petitioners strongly disagree with their *amici* on this point, asserting that their fraudulent conduct falls outside of the "board of trade" provision in the minor clause. *See* Pet. Br. at 16-20. In fact, they do not even agree that the issue remains open in this case, wrongly contending that respondents conceded the point in their opposition to *certiorari*. *Id.* at 5 n.5.[16] Petitioners instead take the position that their "off-exchange" transactions in options contracts involving foreign currency simply were not "conducted on a board of trade" within the meaning of this phrase as used in the Treasury Amendment. *See id.* at 5, 7 n.7, 8-9, 16-20.

Fourth, petitioners and their *amici* are plainly wrong on this point of pure statutory construction. The phrase "board of trade" as used in the Treasury Amendment is a defined term under the CEA. "The term 'board of trade' means any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity." 7 U.S.C. § 1a(1). Although Congress certainly could have limited this definition only to an organized trading exchange, as petitioners would prefer, it did not do so. Instead, the term explicitly embraces "any exchange *or association . . . of persons*" engaged in the business of buying or selling any commodity. The term "commodity," in turn, is defined expansively to include "all services, rights, and

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[16] Respondents accurately stated that petitioners' trading occurred "outside of an organized exchange," Opp. at (I), but respondents did not believe that this answered the question of whether such trading occurred on a "board of trade" as described in the Treasury Amendment, *see id.* at 10-12.

interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(3).

Petitioners easily come within Congress's express definition of a "board of trade." Petitioners comprise several investment companies and one of their principals who associated together to engage in the business of soliciting and executing the purchase and sale of different forms of options contracts in foreign currencies, involving "the sale thereof for future delivery." *See* Pet. App. 1a-2a. A statutory definition of what a term "means" is binding upon the courts. *See, e.g.*, *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947). There is simply no reason why this Court should struggle to avoid the plain consequences of this definition, particularly where they are in line with the general purposes of the CEA, which is designed to regulate a broad spectrum of conduct affecting commodities markets. *See Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, 115 S. Ct. 2407, 2417 (1995) (where Congress includes an "obviously broad word" in an "important statutory definition," it "deserves a respectful reading"); *see also CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 581-82 (9th Cir. 1982) ("board of trade" is defined to mean any "association of persons" and not simply a formally organized commodity exchange).

This interpretation of the minor "unless" clause also harmonizes the statutory language and congressional intent underlying both clauses. As noted above, *see* Sections IB & IC, *supra*, the minor clause merely aids in clarifying the application of the CEA to the new categories of intangible commodities encompassed by the 1974 amendments. As used in this clause, the "board of trade" language is essentially descriptive, rather than restrictive. Given that the entire Treasury Amendment was intended only as a "clarify[ing]" provision, *see* S. Rep. No. 1131 at 23, it is not surprising that even if the kinds of fraudulent activities perpetrated by petitioners were somehow held to be excluded by its major clause, they would still come within the minor clause and thus be subject to regulation under the CEA.

Finally, even if this Court were uncertain about the ambit of the minor "unless" clause, it would again be proper to defer to the CFTC's consistently broad interpretation of Congress's definition of the term "board of trade." *See, e.g.*, CFTC Interpretive Letter 77-12, Com. Fut. L. Rep. (CCH) ¶ 20,467, at 21,911-12 (Aug. 17, 1977); *In re Stovall*, Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,779-82 & n.28 (Dec. 6, 1979); *Co Petro*, 680 F.2d at 576.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondents' brief, the decision below should be affirmed.

Respectfully submitted,

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